84-1362
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PUBLIC SERVICE COMMISSION OF MARYLAND,
Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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88 pp

QUESTIONS PRESENTED

The Communications Act provides that a private party may bring an injunction action in Federal District Court to enforce "any order" of the Federal Communications Commission ("FCC") other than for the payment of money against "any person." The Fourth Circuit ruled *below* in conflict with the First Circuit that the statutory phrase "any order" includes an FCC order issued in a rulemaking proceeding. The Fourth Circuit further ruled that state regulatory commissions are "persons" within the meaning of 47 U.S.C. § 401(b) and are therefore within the enforcement jurisdiction of the Federal courts under the Communications Act. Against this background, the questions presented are as follows:

1. Whether Section 401(b) of the Communications Act, 47 U.S.C. § 401(b), embraces orders issued by the FCC in the course of rulemaking proceedings as the FCC has urged and the Fourth Circuit has held, or whether it is limited to FCC orders issued in adjudicatory proceedings, as the First Circuit has held.

2. Whether a state utility regulatory commission constitutes a "person" within the meaning of 47 U.S.C. § 401(b).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

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The Maryland Public Service Commission petitions for certiorari to review the judgment and decision of the Court of Appeals in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit which is reported at 748 F.2d 879, is attached at Appendix A. The decision of the United States District Court for the District of Maryland is reported at 560 F. Supp. 844 (1983) and is attached at Appendix B. The Opinion of the United States Court of Appeals for the First Circuit, which is reported at 742 F.2d 1, is attached at Appendix C. The *Memorandum Opinion and Order* (Preemption Ruling of the Federal Communications Commission) is reported at 92 F.C.C.2d 864 (1983) and is attached at Appendix D.

JURISDICTION

The decision of the Fourth Circuit Court of Appeals was entered on November 20, 1984. A timely Petition for Writ of Certiorari has been filed by the Public Service Commission of Maryland. This Court has jurisdiction to review the decision below under 28 U.S.C. § 1254(i).

STATUTORY PROVISION

Section 401(b) of the Communications Act of 1934, 47 U.S.C. § 401(b), provides as follows:

> (b) If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

STATEMENT OF FACTS

This case presents a direct conflict between the Fourth and First Circuits over the jurisdiction of federal courts to enforce FCC orders under Section 401(b) of the Communications Act, 47 U.S.C. § 401(b). Both cases, and a number of other similar cases now pending in this Court and in other lower federal courts, arise out of the same background facts.

Local telephone facilities in the United States are used interchangeably to provide both interstate and intrastate

telephone service. As a result of this dual use of local facilities, regulatory control over the operations and facilities of local telephone companies has long been the shared responsibility of federal and state or local authorities.

The Communications Act expressly reserved to the states the authority to prescribe rates for intrastate and local telephone service.[1] Jurisdiction over intrastate rates, services, charges and practices is left to the exclusive jurisdiction of the states when they are "separable from and do not substantially affect the conduct or development of interstate communications."[2]

Similarly, Section 220 of the Communications Act gives the FCC authority to determine certain depreciation issues for local telephone facilities.[3] The statute also requires that the FCC give state agencies an opportunity to present their views and recommendations before any new accounting requirement for depreciation issues is implemented by the FCC.[4]

In rulemaking proceedings in 1980 and 1981, the FCC revised its depreciation rules for telephone company facilities by changing from "whole life" to "remaining life" depreciation methods.[5] Various state commissions participated in the FCC rulemaking proceedings, many of them expressing disagreement with and disapproval of the proposed changes.

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[1] 47 U.S.C. § 152(b) and § 221(b).

[2] *North Carolina Utilities Commission v. F.C.C.*, 537 F.2d 787, 793 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1977).

[3] 47 U.S.C. § 220(a), (b).

[4] 47 U.S.C. § 220(b), (h).

[5] *In Re Amendment of Part 31 etc.*, 83 FCC2d 267 (1980) reconsidered 87 FCC2d 916 (1981).

On April 27, 1982, the FCC formally affirmed its longstanding and undisputed policy through a *Memorandum Opinion and Order* which stated that state regulatory commissions are not preempted by the FCC from adopting depreciation methods for purposes of intrastate rate making which are inconsistent with methods approved by the FCC.[6] The Order was based on a full FCC review of the Communications Act, its legislative history, and years of case law and concluded that there was no clear Congressional intent to preempt inconsistent state prescription of depreciation rates. The Order further stated that such state regulation would not frustrate or conflict with valid federal policies.

In December 1982, the FCC ruled that certain telephone companies must use "remaining life" depreciation methods in setting their *interstate* rates.[7] The FCC expressly said, however, that it would determine the applicability of this choice of methodologies to *intrastate* rates in a "separate proceeding."[8]

The "separate proceeding" was a rulemaking proceeding, which initially involved a different depreciation question; i.e., whether certain telephone assets should be depreciated or treated as current expenses.[9] The FCC concluded that some of the assets should be charged as current expense, at least insofar as interstate rates were concerned.[10] Several telephone companies then asked the

[6] 89 FCC2d 1094 (1982) (April 27 *Memorandum Opinion and Order.*)

[7] *In Re Prescription of Revised Percentages of Depreciation, etc.*, 92 FCC2d 920 (1982).

[8] *Id.* at 928-29.

[9] *In Re Amendment of Part 31, Uniform System of Accounts, etc.*, Docket No. CC 79-105.

[10] 85 FCC2d 818 (1981) *clarified as only affecting interstate rates*, 89 FCC2d 1094 (1982).

FCC to reconsider whether it should not apply this ruie to *intrastate* rates.

In response, in January 1983, the FCC reversed its position enunciated in the April 27 Order and concluded that the language and legislative history of the Communications Act, coupled with its authority to preempt state actions that interfere with federal policies, empowered the FCC to preempt inconsistent state depreciation policies and rates.[11] This Preemption Ruling purports to require the use of Equal Life Group and Remaining Life Depreciation Methods in establishing intrastate rates and preempts the adoption of contrary methods by state commissions.

In July 1982, The Chesapeake and Potomac Telephone Company of Maryland ("C&P") filed an application for a rate increase for its intrastate operations with the Public Service Commission of Maryland ("Md. PSC"). *Inter alia*, C&P proposed the use of remaining life depreciation methods and asserted that the FCC's prescription of such rates required their use for intrastate rate-making purposes. The Md. PSC rejected the proposal and affirming its longstanding preference for the "whole life" depreciation method, concluded that the depreciation rates prescribed by the FCC were inappropriate for establishing intrastate rates in Maryland.

Instead of seeking judicial review of the rate order through the state court system, C&P filed a complaint in United States District Court for the District of Maryland seeking declaratory and injunctive relief.

The District Court granted a preliminary injunction and then closed the docket[12] pending the outcome of a Fourth

[11] *Memorandum Opinion and Order*, 92 FCC2d 864 (1983) ("Preemption Ruling").

[12] *The Chesapeake and Potomac Telephone Company of Maryland v. Public Service Commission of Maryland*, 560 F. Supp. 844 (D. Md. 1983).

Circuit appeal[13] challenging the validity of the FCC Preemption Order. In the interim, the Md. PSC filed an appeal from the District Court's Order to the Fourth Circuit Court of Appeals.[14]

On June 18, 1984, the Fourth Circuit entered an Opinion affirming the Preemption Order in the *Virginia State Corporations Commission* proceeding (*supra*). On November 20, 1984, the Fourth Circuit affirmed the District Court in the Md. PSC proceeding holding that (1) the Preemption Order was an "order" within the meaning of 47 U.S.C. § 401(b) and, therefore, enforceable under the jurisdiction of the District Court; and (2) that the Md. PSC is a "person" within the definition of the Communications Act and, therefore, subject to the jurisdiction of the District Court in enforcement proceedings brought under § 401(b).

In a case presenting basically the same issues, *New England Telephone and Telegraph Co. v. Public Utilities Commission of Maine,*[15] the First Circuit Court of Appeals reached the opposite result in holding that the word "order" in the Communications Act does not encompass an FCC rulemaking decision such as the Preemption Order.[16]

REASONS FOR GRANTING THE WRIT

Certiorari is justified on two independent grounds. First, the central issue in the case — the interpretation of

[13] *Virginia State Corporations Commission v. F.C.C.*, 737 F.2d 388 (4th Cir. 1984) petition for cert. filed sub. nom. *California, et al. v. FCC.*, No. 84-889 (U.S. filed December 12, 1984).

[14] *The Chesapeake and Potomac Telephone Company of Maryland v. Public Service Commission of Maryland*, 748 F.2d 879 (4th Cir. 1984).

[15] 570 F. Supp. 1558 (D. Me. 1983), rev'd 742 F.2d 1 (1st Cir. 1984) petition for cert. filed, No. 84-900 (U.S. filed December 5, 1984).

[16] 742 F.2d 1, 2 (1st Cir. 1984).

Section 401(b) of the Communications Act — is one on which the Fourth and First Circuits are in direct conflict. Therefore, a decision by this Court is necessary to ensure that the federal courts apply that statute in a consistent manner. Second, the Fourth Circuit was incorrect in concluding that a state public utility commission constitutes a "person" within the meaning of 47 U.S.C. § 401(b). This Court should not allow to stand a Fourth Circuit ruling which in essence confers authority on the federal District Courts to enforce FCC decisions against state utility commissions on the strength of an expanded definition of "person" that clearly reaches beyond the language of the Communications Act.

The instant litigation involves a rate-making proceeding conducted by an administrative agency charged with the responsibility of promoting the public interest in the State of Maryland. The extraordinary powers of injunction should be employed to interfere with the action of a state only in a case of manifest oppression,[17] which clearly does not exist here. Private interests must give way to the realization of the public interest inherent in the notions of comity and adminstrative autonomy. The principles of comity support equitable restraint in this case because interference with State utility rate regulation is involved.

It cannot be disputed that granting the injunctive relief sought in this case interfered with Maryland's control of intrastate utility rates, an area which has historically been reserved to the states by Congress.[18] Federal courts should not interfere with the state rate-making process by granting such extraordinary relief. The public interest as

[17] *Petroleum Exploration, Inc. v. Public Service Commission of Kentucky*, 304 U.S. 209, 222 (1938).

[18] *Gulf Water Benefaction Company v. The Public Utility Commission of Texas*, 674 F.2d 462 (5th Cir. 1982).

reflected in the notions of comity and administrative autonomy clearly do not support such actions since they promote needless conflict in the Federal-State relationship and unnecessary interference with state functions.

A. THERE IS A DIRECT CONFLICT BETWEEN THE FOURTH AND FIRST CIRCUITS.

Section 401(b) of the Communications Act authorizes "any party injured" to bring a federal enforcement action against "any person" who disobeys "any order" of the FCC, except an order for the payment of money. The issue in this case is whether the word "order" as used in Section 401(b) includes an order, such as the FCC's Preemption Order of January 6, 1983, insofar as the order is issued in the course of a rulemaking rather than an adjudicatory proceeding. A direct conflict between the circuits exists on this legal issue.

The First Circuit below held that Section 401(b) is limited to adjudicatory orders, that the FCC Preemption Order was not an adjudicatory order and, therefore, the Preemption Order was not an "order" within the meaning of Section 401(b). As a result, it directed the District Court to dismiss New England Telephone's private action to enforce the Preemption Order.

The Fourth Circuit ruled that the Preemption Order is an "order" within the meaning of Section 401(b),[19] citing *Virginia State Corporations Commission v. FCC*, which held that the Preemption Order was a valid and complete preemption of state regulation regarding interstate and intrastate depreciation rates and methods for specified telephone equipment.[20] The Fourth Circuit, therefore,

[19] *C&P v. PSC of Md.*, 748 F.2d 879, 882 (4th Cir. 1984).

[20] *Id.* at 880; *see also Virginia State Corporations Commission v. FCC*, 737 F.2d 388 (4th Cir. 1984), petition for cert. filed sub. nom *California et al. v. FCC*, No. 84-889 (U.S. filed December 12, 1984).

sustained an injunction against the Md. PSC requiring it to obey the *same* Preemption Order that the First Circuit held not to be enforceable under Section 401 against the Maine Commission.

The statutory issue posed by the conflict is not an isolated one limited to two circuits. The Preemption Order purports to be binding on every public utility commission of every state. A number of state commissions have challenged the authority of the FCC to issue such an order and enforcement actions have been brought in the District Courts and subsequently appealed in a number of circuits.[21] The issue itself is likely to recur. The direct disagreement of two circuits on a recurring issue of federal statutory construction amply justifies Supreme Court review. *See* Sup. Ct. R. 17.1(a).

B. THE FOURTH CIRCUIT HAS ERRONEOUSLY CONSTRUED SECTION 401(B) IN HOLDING THAT A STATE UTILITY COMMISSION CONSTITUTES A "PERSON" WITHIN THE MEANING OF THAT SECTION.

Section 401(b), 47 U.S.C. Section 401(b) provides as follows:

> If any person fails or neglects to obey any order of the Commission other than for the payment of money . . . any party injured hereby . . . may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of same, the court shall enforce disobedience to such order . . .

[21] *California and Public Utilities Commission of California, et al. v. FCC*, No. 84-889 (U.S. filed December 12, 1984). *Louisiana Public Service Commission v. FCC*, No. 84-871 (U.S. filed November 30, 1984). *Southwestern Bell Telephone Co. v. Arkansas PSC*, 584 F. Supp. 1087 (D. Ark.) rev'd 738 F.2d 901 (8th Cir. 1984) petition for cert. filed 53 U.S.L.W. 3290 (U.S. October 16, 1984, No. 84-483).

"Person" is defined for purposes of those provisions of the Communications Act regulating wire and radio communication by Section 153(i) as follows:

> "Person" includes an individual, partnership, association, joint-stock company, trust, or corporation, . . .[22]

"State commission" is not listed within this definition. In fact, "State commission" is specifically defined by Congress in a succedent subsection.

> "State commission" means the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers.[23]

The Fourth Circuit has equated a "State commission" as defined in 47 U.S.C. Section 153(t) to a "person" beyond the definition given in the preceding subsection (i). Neither the language nor the history of the Communications Act justifies this action. To include a State utility commission within the same class defined by the words "an individual, partnership, association, joint-stock company or corporation" "offends the traditional canon of statutory construction expanding the general terms beyond the specific words which follow."[24]

Furthermore, as determined by the U.S. District Court for the District of Vermont:

> The statutory scheme offers no suggestion that the provisions of 47 U.S.C. section 401(b) was designed to make injunctive relief available against a State regulatory agency at the instance of a regulated

[22] 47 U.S.C. Section 153(i).

[23] 47 U.S.C. Section 153(t).

[24] *New England Telephone Co. v. Public Service Board of Vermont*, 576 F. Supp. 490, 495 (D. Vt. 1984), *appeal pending*, No. 84-7051 (2d Cir. filed June 27, 1984).

> carrier who asserts it is aggrieved by the State ratemaking process.[25]

This Court must not ascribe an intent on the part of Congress to confer authority on the federal District Courts to enforce rulemaking decisions of the FCC against the state utility commissions "on the strength of an expanded definition of 'person' that clearly reaches beyond the language of section 3 of the Act [47 U.S.C. section 153(i)]."[26] The conclusion of the Fourth Circuit must therefore be rejected and the rationale put forth by the District Court for Vermont should be adopted by this Court.

CONCLUSION

For the reasons stated, certiorari should be granted in this case.

Respectfully submitted,

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[25] *Id.*

[26] *Id.* at 494.

APPENDIX A

United States Court of Appeals
for the Fourth Circuit

No. 83-1403

The Chesapeake and Potomac Telephone Company of Maryland,

Appellee,

v.

Public Service Commission of Maryland, Frank O. Heintz, Chairman, William A. Badger, Commissioner, Lilo K. Schifter, Commissioner, Wayne B. Hamilton, Commissioner, Haskell N. Arnold, Commissioner,

and

Ronald Hawkins, Executive Director and Maryland Office of People's Counsel,

Defendants.

Federal Communications Commission,

Amicus Curiae

Appeal from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, Senior District Judge. (C/A N-83-855)

Argued: December 9, 1983 Decided November 20, 1984

Before RUSSELL and MURNAGHAN, Circuit Judges, and MICHAEL,[1] District Judge

[1] Hon. James H. Michael, Jr., United States District Judge for the Western District of Virginia, sitting by designation.

Kirk J. Emge, General Counsel for the Public Service Commission of Maryland (Sandra L. Hall, Assistant General Counsel on brief) for Appellants; D. Michael Stroud (Robert A. Levetown and Mark J. Mathis; David H. Lloyd, John A. Siliciano, Daniel I. Prywes, Arnold & Porter; J. William Sarver on brief) for Appellee.

PER CURIAM:

This is an appeal from an Order of the District Court granting a preliminary injunction requiring the Public Service Commission of Maryland (PSC) and its officials to comply with a Federal Communications Commission (FCC) Preemption Order dated January 6, 1983. Jurisdiction for this appeal is provided for in 28 U.S.C. § 1292(a)(1) (1982).

PSC argues on appeal that the District Court had no jurisdiction to grant the preliminary injunction, or alternatively that the District Court abused its discretion in granting the preliminary injunction. Prior to addressing those arguments, it is important to discuss briefly the FCC Preemption Order underlying this appeal.

The Preemption Order prescribed depreciation rates and depreciation methods for certain equipment used by telephone companies. The FCC initially indicated that the Preemption Order did not affect the authority of state utility commissions insofar as intrastate communications service was concerned. 89 F.C.C.2d 1094, 1108 (1982). Subsequently, the FCC reversed its position, stating that the Preemption Order completely preempted the authority of state utility commissions to regulate depreciation rates and methods for the specified telephone equipment. C. C. Docket No. 79-105, F.C.C. No. 82-581, slip op. (Jan. 6, 1983).

Notwithstanding the FCC's position regarding the Preemption Order, PSC concluded that the FCC-prescribed rates and methods would be inappropriate in

establishing intrastate depreciation rates. As a result, PSC decided not to comply with the Preemption Order in establishing depreciation rates sought by the Chesapeake and Potomac Telephone Company of Maryland (C&P).

In response to PSC's decision, C&P brought an action to force PSC to comply with the Preemption Order. As a part of that action, C&P obtained the preliminary injunction at issue here. The preliminary injunction required PSC and its officials to comply with the Preemption Order in establishing both interstate and intrastate depreciation rates and methods. The District Court granted the preliminary injunction until the resolution of *Virginia State Corporation Commission v. FCC*, No. 83-1136 (4th Cir. June 18, 1984), an action then pending concerning the validity and effect of the Preemption Order. Although PSC immediately appealed the District Court's decision, we reserved judgment on PSC's appeal until resolution of *Virginia State Corporation Commission v. FCC*, due to the relationship between the two cases.

We subsequently ruled in *Virginia State Corporation Commission v. FCC*, that the Preemption Order was a valid and complete preemption of state regulation regarding interstate and intrastate depreciation rates and methods for the specified telephone equipment. Based on our ruling in that case, we now address PSC's appeal of the District Court's decision granting the preliminary injunction. PSC's appeal consists of two arguments which are considered separately below.

I.

PSC's first argument is that the District Court lacked jurisdiction under 47 U.S.C. § 401(b) to grant the preliminary injunction. That provision states:

> If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appro-

> priate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

47 U.S.C. § 401(b) (1948). There are four points to PSC's argument that the District Court lacked jurisdiction under Section 401(b). First, PSC argues that the District Court lacked jurisdiction under Section 401(b) because PSC is not a "person" with the meaning of that section. This point is without merit because C&P's suit for preliminary injunction named not only PSC but also the officials comprising PSC as defendants. Thus, even if PSC is not a "person" within the meaning of Section 401(b), PSC's officials are expressly covered by that section.

Moreover, we believe that PSC must be considered a "person" within the meaning of Section 401(b). A contrary interpretation would undermine the Federal Communications Act by rendering PSC and other communications "entities" immune from enforcement actions by the FCC under Section 401(b). Therefore, we conclude that PSC's first point does not support its argument that the District Court lacked jurisdiction in this case.

Second, PSC argues that Section 401(b) did not provide the District Court with jurisdiction because the Preemption Order is not an "order" within the meaning of that section. Section 401(b) expressly covers only violations of FCC "orders". Relying on the distinction between administrative orders and rules stated in *CBS v. United States*, 316 U.S. 407, 418 (1942), PSC asserts that the Preemption Order is merely an administrative rule, and therefore outside the scope of Section 401(b).

Although PSC correctly cites *CBS v. United States* for the proposition that administrative orders and rules are distinguishable, we find that the Preemption Order is an "order" within the meaning of Section 401(b). Indeed, our ruling here is dictated by our analysis of the same Preemption Order in *Virginia State Corporation Commission v. FCC*, No. 83-1136 (4th Cir. June 18, 1984).

As noted above, in *Virginia State Corporation Commission v. FCC*, we ruled that the Preemption Order was a valid and complete preemption of state regulation concerning depreciation rates and methods for the specified telephone equipment. That opinion did not explicitly state our jurisdictional basis for reviewing the Preemption Order. Nevertheless, our jurisdiction in that case clearly came from 47 U.S.C. § 402 (1982) because that section is the exclusive means by which this court can review orders such as the Preemption Order. Although *CBS v. United States* construed Section 402 to cover certain administrative rules and regulations, the express language of Section 402 only provides for review of FCC "orders". Since *CBS v. United States* was not discussed or mentioned in *Virginia State Corporation Commission v. FCC*, it is clear that our review of the Preemption Order in that case was based on the express language of Section 402. Thus, our analysis in *Virginia State Corporation Commission v. FCC* included an implicit ruling that the Preemption Order was an order, not a rule or regulation.

That implicit ruling dictates our ruling in the present case that the Preemption Order was an "order" within the meaning of Section 401(b). *Contra New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, No. 83-1779 (1st Cir. June 29, 1984). Thus, Section 401(b) did provide the District Court with jurisdiction to grant a preliminary injunction concerning the Preemption Order. As a result, we conclude that PSC's second point provides no support for its argument that the District Court lacked jurisdiction in this case.

Third, PSC argues that Section 401(b) did not provide the District Court with jurisdiction because that section cannot be construed as creating an implied private cause of action to enforce an FCC ruling. Obviously, this point is based on the assumption that the District Court did not have jurisdiction under Section 401(b) because the Preemption Order was not an "order" within the meaning of Section 401(b). Given our above ruling to the contrary, we conclude that PSC's third point is without merit.

Finally, PSC argues that the Johnson Act, 28 U.S.C. § 1342, is a bar to preliminary injunctions such as the one at issue here. The Johnson Act states that:

> The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:
>
> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
>
> (2) The order does not interfere with interstate commerce; and,
>
> (3) The order has been made after reasonable notice and hearing; and,
>
> (4) A plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1342 (1942).

Although PSC argues that the Johnson Act is applicable to this case, we note that all the prerequisites for application of the Act were not satisfied here. The District Court's jurisdiction in granting the preliminary injunction was based on 47 U.S.C. § 401(b). As such, Section 1342(1) of the Johnson Act was not satisfied. Since the four prerequisites of the Johnson Act are conjunctive, PSC's failure to demonstrate that Section 1342(1) was met here renders the Johnson Act inapposite to the preliminary

injunction in this case. Therefore, PSC's fourth point does not support its argument that the District Court lacked jurisdiction to grant the preliminary injunction.

In sum, there is no support for PSC's first argument. As a result, we rule that the District Court had jurisdiction under 47 U.S.C. § 401(b) to grant the preliminary injunction at issue here.

II.

Given our ruling that the District Court had jurisdiction to grant the preliminary injunction, we must address PSC's second argument — that the District Court abused its discretion in granting the preliminary injunction.

In considering whether to grant the preliminary injunction, the District Court applied the standard articulated in *Blackwelder Furniture Co. v. Seilig Manufacturing Co.*, 550 F.2d 189 (4th Cir. 1977). Accordingly, the District Court examined:

1. The likelihood that C&P would be irreparably harmed if the preliminary injunction were not granted;
2. The likelihood that C&P's customers would be irreparably harmed if the preliminary injunction were granted;
3. The likelihood that C&P would prevail on the merits of its action to force PSC to comply with the Preemption Order; and,
4. Whether the public interest would better be served by granting or denying the preliminary injunction.

PSC argues that the District Court's conclusion regarding each of the above factors was flawed in some way, and thus the District Court abused its discretion in granting the preliminary injunction.

First, PSC asserts that the District Court erroneously concluded that C&P would suffer irreparable harm if the

preliminary injunction were not granted. PSC does not contest the District Court's finding that not granting the preliminary injunction would cost C&P approximately $44,000 per day in lost revenues (i.e., revenues C&P would be receiving if PSC complied with the FCC-prescribed depreciation rates for intrastate ratemaking). However, PSC argues that C&P's loss would not have been irreparable because the District Court could have fashioned an equitable remedy to compensate C&P in the event that C&P prevailed on the merits.

We believe that the District Court correctly found that C&P's loss would have been irreparable. Maryland law provides no statutory device for recovering such a loss, and as PSC concedes, the loss could not have been offset by charging higher rates in the future. *Public Service Commission v. Baltimore Gas & Electric Co.*, 40 Md. App. 490, 393 A.2d 193 (1978); *Chesapeake & Potomac Telephone Co. of Maryland*, 32 Pub. Util. Rep. 3d (PUR) 470, 475 (Md. PSC 1960). Although PSC proposes a court-made equitable remedy, we note that there is no authority cited supporting that proposition nor has this court found any such authority. Since ratemaking in Maryland is reserved for the legislature, *Public Service Commission v. Baltimore Gas & Electric Co.*, 273 Md. 357, 329 A.2d 691, 694 (1974), we conclude that PSC's proposition is without merit. As such, we agree with the District Court that C&P would have suffered a substantial irreparable loss if the preliminary injunction had not been granted.

Second, PSC asserts that the District Court underestimated the harm to C&P's customers if the preliminary injunction were granted. PSC suggests that the preliminary injunction would force some customers to terminate their telephone service, but we do not believe such a result was likely. As noted by the District Court, the preliminary injunction resulted in an effective rate increase of one cent per day to C&P's customers. Furthermore, the rate increase was subject to a refund plus interest from C&P in the event that C&P lost on the

merits of its case against PSC. Given the small amount of the rate increase and the promised refund by C&P, we rule that the District Court correctly concluded that the loss to C&P's customers was not irreparable and was far outweighed by the substantial and irreparable loss to C&P if the preliminary injunction were not granted.

Third, PSC argues that the District Court incorrectly concluded that C&P was likely to prevail on the merits of its case against PSC. Obviously, the fact that the District Court correctly predicted the result in *Virginia State Corporation Commission v. FCC* seriously undercuts PSC's argument. In addition, however, we believe that the District Court had ample justification when it granted the preliminary injunction to conclude that C&P was likely to succeed on the merits. At that time, among courts which had considered the same issues as in this case, the majority position favored C&P's success on the merits. *Pacific Northwest Bell Telephone Co. v. Washington Utilities & Transportation Commission*, No. C83-214C (W.D. Wash. March 10, 1983), *appeal docketed* No. 83-3746 (9th Cir. April 7, 1984). *South Central Bell Telephone Co. v. Louisiana Public Service Commission*, No. 83-557-A (M.D. La. June 27, 1983), *aff'd*, No. 83-3494 (5th Cir. Oct. 11, 1984); *Southwestern Bell Telephone Co. v. State Corporation Commission of Kansas*, No. 83-4125 (D. Kan. May 16, 1983), *appeal docketed*, No. 84-2296 (10th Cir. Sept. 13, 1984). *Contra, New England Telephone & Telegraph Co. v. Public Utility Commission of Maine*, Civ. No. 83-0166-P (D. Me. June 15, 1983), *aff'd* No. 83-1779 (1st Cir. June 29, 1984). Consequently, we believe that the District Court did not err in concluding that C&P was likely to prevail on the merits.

Finally, PSC asserts that the District Court erred in finding that the public interest would better be served by granting the preliminary injunction. Even if we agreed with PSC's assertion, where the first three *Blackwelder* factors favor granting a preliminary injunction, issuance of the preliminary injunction is proper, notwithstanding a

finding that the public interest would better be served by not granting the preliminary injunction. *Id.* at 196. Nevertheless, we believe the District Court correctly found that the public interest would better be served by granting the preliminary injunction. As noted by the District Court, the FCC operates under a Congressional mandate "to make available . . . to all the people of the United States a rapid, efficient, Nationwide, and world-wide . . . communications service with adequate facilities at reasonable charges . . ." 47 U.S.C. § 151 (1937). Since the FCC issued the Preemption Order in an effort to accomplish its Congressional mandate, we do not believe that the District Court erred in concluding that temporarily enforcing the Preemption Order would better serve the public interest. Thus, we dismiss PSC's final argument in support of its position that the District Court abused its discretion in granting the preliminary injunction.

In conclusion, we rule that there is no support for PSC's position that the District Court abused its discretion in granting the preliminary injunction. Given our ruling that the District Court had jurisdiction under 47 U.S.C. § 401(b) to grant the preliminary injunction, we hold that the District Court's decision must be

AFFIRMED.

APPENDIX B

United States District Court
District of Maryland

Civil Action No. N83-855

The Chespeake and Potomac Telephone Company of Maryland,

Plaintiff,

v.

Public Service Commission of Maryland,
Frank O. Heintz, Chairman,
William A. Badger, Commissioner,
Lilo K. Schifter, Commissioner,
Wayne B. Hamilton, Commissioner,
Haskell N. Arnold, Commissioner,

Defendants.

ORDER FOR PRELIMINARY INJUNCTION

(Filed 6th April 1983)

This cause came on for hearing of Plaintiff's Motion for Preliminary Injunction on Wednesday, April 6, 1983. The Plaintiff was represented by D. Michael Stroud, J. William Sarver and Donald N. Rothman. The Defendants were represented by Kirk J. Emge. Intervenor, the Maryland Office of People's Counsel, was represented by James H. DeGraffenreidt, Jr. The Court having reviewed the record herein and heard the oral arguments of counsel, finds and orders as follows:

1. This Court has jurisdiction to issue the injunction sought under 47 U.S.C. § 401(b).

2. The Johnson Act, 28 U.S.C. § 1342, is not a bar to this action.

3. The Plaintiff is entitled to a preliminary injunction and a preliminary injunction should issue.

4. Unless an injunction is issued, the Plaintiff will suffer irreparable harm inasmuch as neither Defendants nor this Court can authorize Plaintiff to recover retroactively any revenues lost during the pendency of the underlying cause of action on the merits.

5. No harm will accrue to the other parties to this proceeding or to the Plaintiff's ratepayers inasmuch as Plaintiff will place the rates at issue in effect subject to refund with interest and will refund any amounts so collected should the January 6, 1983, FCC Order in Docket 79-105 not be upheld on appeal. Collection of rates subject to refund with interest is adequate security under FRCP Rule 65(c).

6. The Court finds that it is in the public interest of ensuring compliance with the Congressional mandate of developing nationwide uniformity in telecommunications policy to enforce a binding FCC order regarding depreciation rates and methodologies while it is in effect.

7. Plaintiff has demonstrated a likelihood of prevailing on the merits of this case.

WHEREFORE, for the reasons stated, it is hereby ordered:

That a preliminary injunction issue against Defendants requiring them to abide by the FCC's January 6, 1983, Order regarding depreciation rates and methodologies until this action is finally resolved and, within ten (10) days of the date of this order, issue an order which provides for the collection of rates by Plaintiff sufficient to recover the intrastate revenue requirement resulting from the FCC-prescribed depreciation rates and methodologies.

These rates will be subject to reasonable refund provisions as the Defendant may authorize should Plaintiff not prevail on the merits of this case and which will

include provisions to make refunds to those customers who terminate service of the Plaintiff during the effective dates of the injunction.

Done, this 6th day of April, 1983.

EDWARD S. NORTHROP,
United States District Judge.

In The United States District Court
For The District of Maryland

Civil Action No. N-83-855

The Chesapeake and Potomac Telephone Company of Maryland

v.

Public Service Commission of Maryland
Ronald Hawkins, Executive Director,
Frank O. Heintz, Chairman
William A. Badger, Commissioner,
Lilo K. Schifter, Commissioner
Wayne B. Hamilton, Commissioner
Haskell N. Arnold, Commissioner

Northrop, Senior Judge

Filed: April 7, 1983

J. William Sarver, Esquire of Baltimore, Maryland; Mark H. Mathis, Esquire and D. Michael Stroud, Esquire, of Washington, D.C.; and Donald N. Rothman, Esquire of Gordon, Feinblatt, Rothman, Hoffberger, and Hollander, of Baltimore, Maryland, for plaintiff.

Kirk J. Emge, Esquire, Chief Hearing Examiner of Public Service Commission of Maryland, of Baltimore, Maryland, for defendant.

James H. DeGraffenreidt, Jr., Esquire of Baltimore, Maryland, for Intervenor, Maryland Office of People's Counsel.

MEMORANDUM

In this action the plaintiff, Chesapeake and Potomac Telephone Company of Maryland (hereinafter "C&P"), seeks a preliminary injunction preventing the Public Service Commission of Maryland and its executive director and commissioners (hereinafter "PSC") "from the operation, enforcement or execution of that portion of Order No. 66114 of the Maryland Public Service Commission that prevents plaintiff from collecting intrastate charges for telephone services based on depreciation rates prescribed by the Federal Communications Commission." Motion for Preliminary Injunction at 1-2. C&P alleges it is losing $44,000 per day as a result of that Order, causing it to suffer substantial and irreparable harm because regulatory law does not permit retroactive recovery of this revenue. It further contends that in the event the rate increase is later determined to be unjustified, its' customers can be protected through a refund of their excess contribution, with interest. C&P also suggests that a rate change of no more than 2.2% would result in its recovery of this revenue. The Maryland Office of People's Counsel (hereinafter People's Counsel), upon motion to this Court, was granted leave to intervene on April 6, 1983. The People's Counsel joins PSC in all substantive respects.

These proceedings had their genesis in an order of the FCC released January 6, 1983, in which the FCC reconsidered and revised its general position on the rate depreciation system in telecommunications. *See* Uniform System of Accounts, CC Docket No. 79-105, FCC 82-581 ("The Preemption Order") (Attachment A to Complaint). Today, it is the FCC's position that Section 220 of the Communications Act, 47 U.S.C. § 220, permits the FCC to preempt states insofar as the establishment of depreciation expense determinations. *See* Preemption Order

at 6. C&P, like other companies in the telecommunications industry, has been prescribed depreciation rates by the FCC which it intends to utilize. Nevertheless, because the PSC believes the FCC Preemption Order unlawfully infringes upon the State of Maryland's authority to set its own intrastate rates, it has declined to abide by the new FCC formula. *See* Order No. 66114 at 12-18 (entered Feb. 18, 1983) (Attachment B to Complaint). The PSC suggests "the depreciation practices established by the FCC in no way limit this Commission's authority to determine the appropriate level of depreciation expense to be reflected in intrastate rates for telephone service." *Id.* at 18.

Subject Matter Jurisdiction

Initially, the PSC opposes the plaintiff's request for a preliminary injunction on the grounds that this Court lacks subject matter jurisdiction. Memorandum of Law of Public Service Commission of Maryland in Opposition to plaintiff's Motion for Preliminary Injunction (hereinafter "Opposition") at 4-15. C&P disagrees and contends Section 401(b) of the Communications Act, 47 U.S.C. § 401(b), confers jurisdiction upon this Court. That section reads as follows:

> (b) If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, to enjoin upon it or them obedience to the same.

The PSC objects to the applicability of that statute by emphasizing the statutory reference to failure or neglect of any "person" to obey any order of the FCC. *See* Opposition at 8-9. In the Communications Act, "person" includes "an individual, partnership, association, joint-stock company, trust, or corporation." 47 U.S.C. § 153(i). "State Commission" is defined separately, *see id.* § 153(t), and the PSC argues it is therefore not included in the definition of "person." *See id.* § 153(i).

Within the past month, another court faced and rejected this very argument. *See Pacific Northwest Bell Telephone Co. (PNB) v. Washington Utilities and Transportation Commission (WUTC)*, No. C83-214C (W.D. Wash. March 10, 1983) (hereinafter "PNB v. WUTC"). It held:

> 47 U.S.C. § 401 provides the only means through which the FCC or a private party can seek the enforcement of a valid FCC order or provision (There are some additional provisions elsewhere in the statute which specifically address the enforcement of orders against carriers by the FCC). §§ 401(a) and (c) are directed to the prosecution of violations of *provisions* of the chapter by the FCC and § 401(b) is directed to enforcement of FCC *orders*. Since § 401(b) is the only method by which anyone, including the FCC, could secure enforcement of its orders, the Court is inclined to believe that Congress intended this provision to apply to all violations. Although the Court recognizes the fact that Congress was very sensitive to the delicate balance of power as between the FCC and state commissions in the area of regulating communications, the Court believes that Congress addressed these concerns by providing ample provision for review of FCC orders. Congress could hardly have intended to allow a state commission to refuse the opportunity to seek review of a FCC order on the grounds that it was not a "person" within the meaning of the enforcement section of the statute.

> Rather, this Court finds that Congress intended FCC orders to be enforceable until suspended through proper process (§ 408). Further, the Court finds that there is no rational basis for excluding state commissions from the group of persons against whom enforcement may be sought since they clearly have the same opportunity as any other person to seek review and suspension of orders with which they disagree.
>
> Thus, the Court finds that there is jurisdiction under 47 U.S.C. § 401(b).

This Court likewise finds that a state commission is a person within the meaning of § 401(b). Accordingly, PSC's first jurisdictional argument must be rejected.

The second basis for PSC's challenge to this Court's subject matter jurisdiction is the Johnson Act, 28 U.S.C. § 1342. *See* Opposition at 10-15. It reads:

> The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:
>
> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; *and,*
>
> (2) The order does not interfere with interstate commerce; *and,*
>
> (3) The order has been made after reasonable notice and hearing; *and,*
>
> (4) A plain, speedy and efficient remedy may be had in the courts of such State.

(Emphasis added). This Court has just held that jurisdiction may be predicated upon § 401(b). This Court therefore has federal question jurisdiction. Jurisdiction is not based solely on diversity of citizenship or repugnance of the order to the Federal Constitution. Accordingly, the

Johnson Act does not preclude subject matter jurisdiction here.

Preliminary Injunction Standards

In determining the propriety of a preliminary injunction in this case, the parties have agreed that the proper standard is the test articulated in *Blackwelder Furniture Company v. Seilig Manufacturing Co.*, 550 F.2d 189 (4th Cir. 1977). The factors of that test are as follows:

(1) the likelihood of irreparable harm to the company without the preliminary injunction;

(2) the likelihood that other parties will be irreparably harmed if an injunction is issued;

(3) the company's likelihood of success on the merits; and

(4) the public interest.

The first step, of course, is for the Court to balance the likelihood of irreparable harm to the plaintiff without an injunction against the likelihood of harm to the defendant with an injunction. *Maryland Undercoating Company, Inc. v. Payne*, 603 F.2d 477 (4th Cir. 1979). "If a decided imbalance of hardship should appear in the plaintiff's favor, it is enough that grave or serious questions are presented; plaintiff need not show a likelihood of success on the merits. The need for plaintiff to show likelihood of success on the merits increases as the probability of irreparable injury without an injunction decreases." *Id.* Finally, the public interest must be considered.

In *PNB v. WUTC, supra*, the Washington court noted that prior to consideration of these four factors, the court must determine whether the statutory preconditions of injunctive relief have been met. *See* slip op. at 9-10. Section 401(b) provides in pertinent part:

> If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the

> court shall enforce obedience to such order by a writ of injunction or other proper process. . . .

The court found that there was no dispute that the Preemption Order at issue, the same order at issue in this case, was regularly made and that WUTC was duly served with a copy of the order. Slip op. at 9.

The Washington court then rejected WUTC's argument that it had not violated the Preemption Order because the order had not told it to do anything. *See* slip op. at 9. Like the PSC, WUTC contended that the Order did not limit its authority to determine depreciation expense. *See id.* at 9-10. The court also stated that the issue of FCC authority to preempt the entire field of depreciation charges was not before it because that issue was not subject to review in the district court. *See id.* at 10.

After making these preliminary determinations, the court held that a preliminary injunction was appropriate. It based its holding on a finding that PNB was forced to forego substantial revenues to offset expenses and that PNB could not retroactively recapture these revenues if it ultimately prevailed. The court noted that in the event PNB did not prevail, the rate increase could be refunded. *See id.* at 10.

Although the Washington Court found that the Preemption Order was "regularly made" the PSC and the People's Counsel suggest that the order presently at issue was not regularly made because the FCC was without authority. *See* Opposition at 29; Memorandum of Maryland Office of People's Counsel in Opposition to Motion for Preliminary Injunction (hereinafter cited as "Opp. of People's Counsel") at 14-15 It is more likely, however that the term "regularly made" refers to procedural regularity because jurisdiction over the issue of the validity of an FCC Order is vested exclusively in the Court of Appeals. *See* 28 U.S.C. § 2342(1). Procedural regularity has not been challenged.

Like the Washington Court this Court must consider irreparable injury to the utility if a preliminary injunction is not granted. C&P alleges that for this rate year alone, it will lose $16.1 million in revenues if the PSC does not follow the FCC mandated depreciation standard. C&P further alleges that under Maryland law there is no statutory device through which it could retroactively recover revenues after a determination in its favor. The PSC, along with courts in other jurisdictions has refused to allow such a retroactive recovery. *See* C&P's Memo at 6-8.

Therefore, in the absence of a showing that some other remedy is available which can safeguard this FCC mandated depreciation entitlement, this Court has no choice but to find C&P will suffer irreparable harm in the absence of an injunction. The People's Counsel's and the PSC's argument that this Court retains the equitable power to order the PSC to reimburse C&P through retroactive compensation must be rejected, as it is nothing more than an attempt to have this Court order the PSC to do what the legislature forbids.

Besides considering the harm to C&P if this preliminary injunction is not granted, the Court must also consider the harm other parties might suffer if the preliminary injunction is granted. In particular, the Court is concerned about the impact an injunction would have on the residents of Maryland. The PSC and the Peoples Counsel suggest that any increase, no matter how small, may cause some consumers to give up their phone service or forego the opportunity to acquire phone service, and thereby jeopardize their rapid access to emergency health services and police and fire protection. Inasmuch as the requested increase roughly translates into a penny per day, I find that argument untenable. No reasonable person will terminate their utility service for that amount of money.

Moreover, in the event the United States Court of Appeals for the Fourth Circuit rules the FCC exceeded its power in establishing uniform accounting principles, C&P has agreed to return all excess monies paid to its customers, with interest. The formula for that rebate would likely amortize the return over a reasonable period and should permit those individuals who paid the increased rate, but who subsequently terminated their telephone service, the opportunity to individually petition C&P for their refund.

As to the People's Counsel's suggestion that because the appellate process is unlikely to produce a definitive resolution of this issue before the divestiture is implemented, C&P will be left to make the refunds after having transferred away at below book value assets which enabled AT&T to benefit from the accelerated depreciation and, under these circumstances to the extent that the refund obligation proves burdensome to C&P, that burden could ultimately flow through to C&P ratepayers unless AT&T is somehow held responsible after divestiture along with C&P, Opposition of People's Counsel at 11-12, that is an accounting problem better left to C&P and the PSC. Furthermore, because the argument is speculative in nature, it cannot stand in the way of the injunctive relief requested.

On the issue of "public interest," this Court finds it in the public interest that the Congressional mandate that there be a nationwide uniformity in telecommunications policy be followed. To bifurcate that interest further, so as to accept the PSC's argument that the residents of Maryland have a separate overriding concern beyond the national interest would be to view the concept of public interest too narrowly.

Finally, the fourth factor which the Court must consider is whether C&P has demonstrated a likelihood of success on the merits. Exclusive jurisdiction over this issue has

been vested in the United States Court of Appeals. *See* 28 U.S.C. § 2342(1); *City of Peoria v. General Electric Cablevision Corp.*, 690 F.2d 116, 119 (7th Cir 1982). In fact, the issue is presently before the Fourth Circuit due to a suit filed by the Virginia utilities commission. *See Virginia State Corp. Comm'n. v. FCC*, No. 83-1136 (4th Cir., filed Feb. 11, 1983). Nevertheless, for the purposes of this decision, this Court must independently consider the issue.

In recent years, two separate panels of the Fourth Circuit upheld an FCC program of registration of telephone equipment used for both interstate and intrastate communications. *See North Carolina Utilities Commission v. FCC*, 537 F.2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976) (hereinafter cited as *NCUC I*); *North Carolina Utilities Commission v. FCC*, 552 F.2d 1036 (4th Cir. 1977), *cert. denied*, 434 U.S. 874 (1977). The Fourth Circuit approvingly cited Chief Justice Burger's admonition that:

> the Communications "Act must be construed in light of the needs for comprehensive regulation and the practical difficulties inhering in state by state regulation of parts of an organic whole."

NCUC I, supra, at 795-96. The PSC does not dispute that the telephone plant to be depreciated is used to provide both interstate and intrastate service. *See* Opposition. Accordingly, the Court finds there is a strong likelihood that the Fourth Circuit will uphold the Preemption Order.

For these reasons, a preliminary injunction should issue against the defendants requiring them to abide by the FCC's January 6, 1983 Order regarding depreciation rates and methodologies. This Court will not, however, accept C&P's conclusory averment that it is entitled to an automatic 2.2% rate increase. The PSC, not the Court, has the expertise in this area and will accordingly be required to issue an order within 10 days which provides for the collection of rates by C&P sufficient to recover the

intrastate revenue requirement as established by the FCC.

These rates will be subject to reasonable refund provisions as the PSC may authorize should C&P not prevail on the merits of this case. Finally, such refund provisions must include provisions to make refunds to those C&P customers who terminate service with C&P during the effective dates of the injunction.

EDWARD S. NORTHROP,
Senior United States District Judge.

April 7th, 1983

APPENDIX C

In The
United States Court of Appeals
For The First Circuit

No. 83-1779

New England Telephone and Telegraph Company, etc.,
Plaintiff, Appellee.

v.

Public Utilities Commission of Maine, et al.,
Defendants, Appellants.

Appeal from the United States District Court
for the District of Maine
[Hon. Gene Carter, U.S. District Judge]

Before Campbell, Chief Judge,
Breyer, Circuit Judge,
and Gierbolini,[2] District Judge.

William E. Furber, with whom Charles F. Dinghman, Cushing P. Samp, Joseph G. Donahue, Peter L. Murray, and Murray, Plumb & Murray were on brief, for appellants.

Francis X. Bellotti, Attorney General, and Charles R. Peck, Assistant Attorney General, Commonwealth of Massachusetts, Utilities Division, Public Protection Bureau, on brief for the Attorney General for the Commonwealth of Massachusetts, amicus curiae.

[2] Of the District of Puerto Rico, sitting by designation.

Robert A. Lewis, with whom Ralph I. Lancaster, Jr., Everett P. Ingfalls, and Pierce, Atwood, Scribner, Allen, Smith & Lancaster were on brief, for New England Telephone and Telegraph Company.

June 29, 1984

BREYER, *Circuit Judge*. In this case a private party seeks to enforce a decision of the Federal Communications Commission against a recalcitrant state utilities commission. The FCC promulgated a rule that required state public utility commissions to follow a certain method for calculating depreciation of telephone company equipment. The Public Utilities Commission of Maine ("the P.U.C.") evidently ignored the FCC rule. The private party, namely the New England Telephone Company, invoking the authority of section 401(b) of the Federal Communications Act, 47 U.S.C. § 401(b), obtained a federal district court injunction requiring the Maine commission to comply with the FCC rule. 570 F. Supp. 1558 (D. Me. 1983). Section 401(b) of the Act states that if anyone

> fails or neglects to obey any order of the [Federal Communications] Commission . . ., any party injured thereby . . . may apply to the appropriate district court of the United States for the enforcement of such order.

We find that the word "order" in this statute does not include an FCC rulemaking decision of the sort here at issue. Thus, the district court lacked authority to issue the injunction.

I.

We start by examining the FCC decision at issue. The decision focused upon the question of how to recapture through depreciation charges the cost of a telephone company asset that has unexpectedly lost some of its anticipated economic value. (For a general description of cost recovery through regulated rate-setting, see *Distrigas*

of Massachusetts Corp. v. FERC, No. 83-1633 (1st Cir. June 14, 1984).) To take an oversimplified, imaginary example to illustrate the problem, suppose that the telephone company originally thought that some connecting equipment (say, a $50 fuse) installed in 1960 on the line between a house and a street pole would last fifty years. The company might initially depreciate the equipment at the rate of $1 per year. Suppose further that in 1980, after the company has recaptured $20 through depreciation charges, a new, dirt cheap, technological development makes it sensible to replace the fuse in 1985, instead of in the year 2010. How should the company recapture the remaining $30 of its original equipment cost? One depreciation method, called the "whole life" method, would have the company recalculate the annual depreciation charge for future years by dividing the original $50 cost by the newly estimated whole life of the asset (25 years). Thus, for the next five years, the company would charge $2 per year. By 1985, the company, then, would have recovered $30 of its $50 investment; the remainder would be recovered after the fuse was taken out of service. Another method, called the "remaining life" method, would have the company recalculate the annual depreciation allowance by dividing the remaining undepreciated cost of the fuse ($30) by its remaining useful life. So, the company would charge $6 per year for the years 1981 to 1985, recovering the total cost by the time the fuse was retired from service.

The economic implications of the choice between these methods are likely to be complex and may be of great importance. *See generally* Cornell, Pelcovits, & Brenner, *A Legacy of Regulatory Failure*, Regulation, July/Aug. 1983, at 37; Fogarty, *Capital Recovery: A Crisis for Telephone Companies, A Dilemma for Regulators*, Pub. Util. Fort., Dec. 8, 1983, at 13. The "remaining life" method, for example, apparently means that consumers will have to pay more in the near future, but less in the more distant future. Moreover, there are those who argue that in the newly deregulated telephone world, the foreseeably long-

term higher "phantom" depreciation charge resulting from the whole life approach (say, $2 extra per year from 1985 to 1995 to recover for the replaced fuse) could lead important customers to switch from the regular telephone system to other lower priced (but economically more costly) systems. If so, customer desertion could deprive the regular system of important sources of revenue and burden remaining customers with still higher charges.

Whether or not these concerns are accurate, the fact is that in 1980 the FCC announced that it would switch from "whole life" to "remaining life" depreciation methods. *In re Amendment of Part 31, etc.*, 83 FCC2d 267 (1980), *reconsidered*, 87 FCC2d 916 (1981). And in December 1982 it ruled that New England Telephone and certain other phone companies must use "remaining life" systems in setting their *interstate* rates. *In re Prescription of Revised Percentages of Depreciation, etc.*, 92 FCC2d 920 (1982). It expressly said, however, that it would determine the applicability of its choice of methodologies to *intra*-state rates (the subject now before us) in a "separate proceeding." *Id.* at 928-29.

The "separate proceeding" was a rule-making proceeding, which initially involved a different depreciation question, namely whether certain telephone assets should be depreciated or treated as current expenses. *In re Amendment of Part 31, Uniform System of Accounts, etc.*, Docket No. CC 79-105. The FCC concluded that some of the assets should be charged as current expenses, at least insofar as *inter*state rates were concerned. 85 FCC2d 818 (1981), *clarified as only affecting interstate rates*. 89 FCC2d 1094 (1982). Several phone companies then asked the FCC to reconsider whether it should not apply its rule to *intra*-state rates as well.

In the meantime, an Ohio telephone company asked the FCC for a "declaratory ruling" that the Commission's newly announced preference for a "remaining life" depreciation system applied to *intra*-state, as well as to

interstate, rates and preempted contrary preferences of state regulatory commissions. The FCC evidently believed that the Ohio case and the *Part 31* case reconsideration both involved the same general question, whether the FCC should require state commissions to apply FCC depreciation policies in intra-state ratemaking. Hence, it consolidated the two proceedings.

In January 1983 the FCC announced its decision in the (now consolidated) *Part 31* reconsideration. 92 FCC2d 864 (1983). It held that its methods for calculating depreciation were automatically binding upon the state commissions under the Communications Act, 47 U.S.C. § 220(b). It added that, in any event, even if the federal Act did not *automatically* preempt the right of state commissions to follow different depreciation methods for intra-state transactions, the Commission could (and did) forbid their doing so, for a nationally uniform depreciation policy was of great importance to a sound national communications policy. The Maine P.U.C. was not a party to the *Part 31* reconsideration proceeding, but some other state regulatory commissions were, and several of these commissions have appealed the FCC's ruling to the Fourth Circuit, where the case awaits decision. *Virginia State Corporation Commission v. FCC*, No. 83-1136 (4th Cir.).

In April 1983, three months after the FCC's consolidated *Part 31* reconsideration decision, the Maine P.U.C. denied New England Telephone a rate increase in part because the increase rested upon the use of "remaining life" depreciation. The Maine commission decided that the FCC decision was unlawful — that the FCC could not tell it what depreciation methods to use. New England Telephone appealed the P.U.C.'s decision to the Maine Supreme Judicial Court, but it did not raise the "remaining life" issue in its appeal. Instead, it went to federal court, under 47 U.S.C. § 401(b), arguing that the Maine commission's defiance of the FCC was unlawful and should be enjoined. The federal district court agreed. The Maine P.U.C. now appeals its decision.

II.

The FCC decision at issue is the product of a rulemaking proceeding, namely the *Part 31* reconsideration. *See* pages 19-20 *infra*. The decision also fits the Administrative Procedure Act's definition of a "rule:" It is "an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy . . ." 5 U.S.C. § 551(4). Hence, we consider it to be a rule. And, we ask whether such a rule can also be considered an "order of the Commission" within the terms of section 401(b) of the Communications Act. We note that several other courts have been asked to enforce the preemptive effect of the FCC's *Part 31* reconsideration decision pursuant to section 401(b), and a number of them have granted the requested injunctions. *See Southwestern Bell Telephone Co. v. Arkansas Public Service Commission*, No. 84-1488 (8th Cir. June 7, 1984); *South Central Bell Telephone Co. v. Louisiana Public Service Commission*, 570 F. Supp. 227 (M.D. La. 1983); *Pacific Northwest Bell Telephone Co. v. Washington Utilities & Transportation Commission*, 565 F. Supp. 17 (W.D. Wash. 1983); *Chesapeake & Potomac Telephone Co. v. Public Service Commission*, 560 F. Supp. 844 (D. Md. 1983). But none of the courts granting injunctions, aside from the district court below, have directly addressed the question the Maine P.U.C. has raised here: whether the FCC's decision constitutes an "order" in the contemplation of section 401(b). We conclude that it does not, for several reasons.

First, the Administrative Procedure Act defines the word "order" as "a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency *in a matter other than rulemaking*. . . ." 5 U.S.C. § 551(6) (emphasis added). Although this definition applies to the APA, enacted in 1946, and not necessarily to the Communications Act, enacted in 1934, the APA was the product of extensive study of pre-existing procedure. Some of its provisions — particularly those governing judicial

review — were largely declaratory of existing law. Byse, *Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 Harv. L. Rev. 1823, 1829 (1978). And, post-APA statutes and rules typically incorporate the APA's concepts and distinctions. Thus, even if pre-APA statutes used the term "order" inconsistently, procedural coherence warrants reference to the APA's definitions as a starting point and their use as a guide in determining the proper construction of pre-existing, related procedural statutes — at least where other non-APA considerations also point clearly in the same direction. *See Kroeger v. Stahl*, 148 F. Supp. 403, 406 (D.N.J.) (using APA definition of "order" in interpreting 47 U.S.C. § 401(b), *aff'd* 248 F.2d 121 (3d Cir. 1957).

Second, to interpret section 401(b) more broadly — to apply it beyond the context of the "adjudicatory order" — threatens to interfere seriously with the well established principle that the "enforcement" of the Communications Act is "entrusted primarily to an administrative agency." *Massachusetts Universalist Convention v. Hildreth & Rogers Co.*, 183 F.2d 497, 500 (1st Cir. 1950); *see Lechtner v. Brownyard*, 679 F.2d 322, 327 (3rd Cir. 1982) ("The focus of the Act is the general public, with the FCC, not the private litigant, as its champion."). Section 401, in relevant part, reads as follows:

> (a) The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this chapter by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this chapter.
>
> (b) If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

The first part, subsection (a), allows the *Commission* to ask a federal court to enjoin "a failure to comply with or a violation of any of the provisions" of the Act; the second part, subsection (b), allows a private person to require compliance with a Commission "order." Section 401(a) allows the Commission to decide precisely where and how to enforce the Act. Section 401(b) is consistent with the Commission's prerogatives under section 401(a) only if the term "order" is read to apply exclusively to those cases in which the Commission has previously considered and determined the specific rights and duties in question and where the private action seeks only to enforce the Commission's specific mandate. Only then would the Commission retain enforcement initiative, selecting a particular target for regulatory action and specifying the regulatory constraints that are to govern the target.

Third, to interpret "order" in section 401(b) broadly enough to encompass rules threatens the sound development of a coherent nationwide communications policy — a central objective of the 1934 Act. *See* 47 U.S.C. § 151; *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); *Benanti v. United States*, 355 U.S. 96, 104 n.14 (1957). Rules are general in form and they can be highly general in content. *See, e.g., Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 418 (1942) ("Unlike an administrative order or a court judgment adjudicating the rights of individuals, which is binding only on the parties to the particular proceeding, a valid exercise of the rule-making power is addressed to and sets a standard of conduct for all

to whom its terms apply."); *Precious Metals Associates, Inc. v. Commodity Futures Trading Commission,* 620 F.2d 900, 911 (1st Cir. 1980) ("Rulemaking proceedings are . . . designed to fill in the interstices of a statute.") (citing *SEC v. Chenery Corp.,* 332 U.S. 194, 202 (1947) and *United States v. Florida East Coast Railway Co.,* 410 U.S. 224, 245 (1973)); *PBW Stock Exchange, Inc. v. SEC,* 485 F.2d 718, 732 (3rd Cir. 1973) ("Rulemaking . . . characteristically involves . . . declaring generally applicable policies binding upon the affected public generally, but not adjudicating the rights and obligations of the parties before it."), *cert. denied,* 416 U.S. 969 (1974).

To apply a rule to particular cases often (though not always) requires not only adjudicatory fact finding, but also interpretation of the rule's scope and meaning. *See, e.g., Gardner v. Toilet Goods Association,* 387 U.S. 167, 193-98 (Fortas, J., dissenting) (1967); *Board of Trade v. Commodity Futures Trading Commission,* 704 F.2d 929, 932-33 (7th Cir. 1983). To construe 401(b) to include a private right to enforce commission rules would place this interpretative function squarely in the hands of private parties and some 700 federal district judges, instead of in the hands of the Commission. At best, responsibility for uniform policy would rest on the shoulders of an overworked (and inexpert) Supreme Court. The result would be to deprive the FCC of necessary flexibility and authority in creating, interpreting, and modifying communications policy. And one need only look at the highly general language in which some Commission rules are stated to realize that this shift of power from Commission to courts is not merely a theoretical concern. *See, e.g.,* 47 C.F.R. § 21.3 (general principles of telecommunications licensing); 47 C.F.R. § 73.1920 (personal attack rule). There is no reason to believe that Congress intended an interpretation of 401(b) that could threaten such a shift or undermine the well established bar against private actions to enforce the Communications Act. *See, e.g., Lechtner v. Brownyard, supra; Massachusetts Universalist Convention v. Hildreth & Rogers Co., supra.*

Fourth, the Act's statutory review provisions can be read more fairly and coherently if 401(b) is construed narrowly. The normal way to obtain review of an FCC order is for a party to petition a circuit court of appeals. 47 U.S.C. § 402; *see, e.g., City of Rochester v. Bond,* 603 F.2d 927, 934-35 (D.C. Cir. 1979) (§ 402 as exclusive route to judicial review). Section 401(b) seems to foresee such review, for it discourages the district courts from re-examining the validity of the FCC "order" in question. It states that if, "after hearing, th[e] court determines that the order was regularly made and duly served," the court shall enforce obedience; this language suggests that the substantive validity of the order is not to be considered. *See Southwestern Bell Telephone Co. v. Arkansas Public Service Commission,* No. 84-1488 (8th Cir. June 7, 1984); *American Bond & Mortgage Co. v. United States,* 52 F.2d 318, 320 (7th Cir. 1931), *cert. denied,* 285 U.S. 538 (1932); *United States v. National Plastikwear Fashions, Inc.,* 123 F. Supp. 791, 793-94 (S.D.N.Y. 1954). This "split" of power between circuit and district courts (leaving 'review' to the first and 'enforcement against the disobedient' to the second) makes a degree of sense where an 'adjudicatory' order is at issue, for the 'disobedient person' in such a case was likely a party to the order and might have sought review of the agency decision in the circuit court. It makes far less sense and is far less fair in the case of an agency rule, which might well be enforced against persons not parties to the rulemaking proceeding. *Compare Yakus v. United States,* 321 U.S. 414 (1944) (administrative regulation can be enforced in proceeding which precludes review of validity of the regulation) *with Adamo Wrecking Co. v. United States,* 434 U.S. 275 (1978) (suggesting troubling nature of the *Yakus* holding and its limited reach) *and id.* at 289-90 (Powell, J., concurring) (same). The anomaly of such a restriction on proceedings to enforce rules would have been perceived still more forcefully in 1934, when 'pre-enforcement' review of rules was virtually non-existent — when the validity of a rule was typically first considered at the time of enforcement. *See, e.g., Federal Power Commission v. Metropolitan*

Edison Co., 304 U.S. 375, 383-85 (1938); Verkuil. *Judicial Review of Informal Rulemaking*, 60 Va. L. Rev. 185, 196-97 & n.55, 202-03 (1974). *Cf. Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 70-71 & n.20 (1970). And this fact makes it rather unlikely that Congress believed section 401(b) would apply to Commission rules.

Fifth, other sections of the Communications Act use the word "order" in a way that seems to envision Commission decisions requiring specific actions of specific carriers. *See, e.g.*, 47 U.S.C. §§ 201 (orders directing carriers to establish through services); 204 (orders concerning collection and refund of proposed increased rates); 205 (order directing carrier to cease and desist from charging unreasonable rates); 209 (order directing carrier to pay damages for violation of Act); 214(d) (order directing carrier to expand its facilities). With one exception, to which we shall turn shortly, we are unaware of any provision that uses the word "order" to refer to FCC interpretations of the Act or to FCC rules of general applicability. Indeed, section 416 of the Act, 47 U.S.C. § 416(a), provides that "[e]very order of the Commission shall be forthwith served upon the designated agent of the carrier. . . ." This language suggests that Congress assumed that "orders" took the form of specific directives to specific parties.

Sixth, to allow communications common carriers to enforce generalized FCC policy against state commissions through 'enforcement' suits in federal district courts threatens issue splitting and procedural complexity. New England Telephone, for example, might readily have raised the 'depreciation' problem in the Maine Supreme Judicial Court, where it obtained review of the rest of the P.U.C.'s rate decision in which the depreciation issue was embedded. Instead, it expressly withheld the issue from that proceeding, bringing it before the federal district court instead, thereby leaving the state court in the difficult position of trying to judge the reasonableness of certain of the P.U.C.'s determinations — the selection of a rate of return fairly reflecting the risks to investors, for example — without considering the closely inter-related depreciation issue. The Maine courts were to review Hamlet without the Prince; the federal courts, the Prince without the rest of the play. Since the supremacy clause of the federal Constitution requires the Maine courts to apply federal communications law where appropriate, we see no reason to read the statute to encourage this form of fractionated review.

III.

Before concluding, we consider three arguments in New England Telephone's favor:

First, in *Columbia Broadcasting System v. United States, supra*, the Supreme Court interpreted the word "order" in 401's neighboring section, section 402, to encompass agency rules promulgated after rule-making proceedings. Thus, our interpretation requires reading the same word differently in the two sections. While we recognize the force of the argument calling for a similar construction, *see, e.g., Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932); *Firestone v. Howerton*, 671 F.2d 317, 320 & n.6 (9th Cir. 1982), we find sufficient difference in the functions of the two sections to justify assigning a different scope to the same word in the two settings. *See, e.g., United States v. Stauffer Chemical Co.*, 684 F.2d 1174, 1184-85 (6th Cir. 1982), *aff'd*, 104 S. Ct. 575 (1984); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 461 n.230 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

Section 402(a), which the *CBS* Court considered, concerns judicial review of FCC decisions. It states

> Any proceeding to enjoin, set aside, annul, or suspend any *order* of the Commission under this chapter (except those appealable under subsection(b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

47 U.S.C. § 402(a) (emphasis added); *see* 28 U.S.C. § 2342 ("The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of (1) all final *orders* of the Federal Communications Commission made reviewable by section 402(a) of title 47. . . .") (emphasis added). *CBS* concerned the FCC's Chain Broadcasting Regulations, which told broadcasting stations in part how they were to deal with the networks. CBS argued that the Court should review the regulations' lawfulness, despite the absence of any enforcement order based on the regulations. If it had to wait until the regulations were enforced to secure judicial review of their validity, it might have to wait forever, CBS said, for the stations intended to obey the regulations, to CBS's detriment. Thus, to interpret "order" in section 402 to apply only to the outcome of an adjudicatory enforcement proceeding would deprive those who might be seriously injured by others' obedience to an FCC rule of any opportunity to challenge the rule's legal validity. The Court agreed. And it considered the regulations to have sufficiently serious and immediate impact to warrant pre-enforcement review of their lawfulness. Accordingly, rules were swept within the scope of section 402's reference to "any order."

As this statement of the issues in *CBS* reveals, the policy concerns relevant to a proper interpretation of the word "order" in section 402 involve fundamental principles of judicial review and fair treatment. These concerns point towards a broad interpretation of the word in section 402, but no such considerations are at issue in the case of section 401. To the contrary, private parties have no inherent right to enforce FCC rules, and, as we have remarked above, considerations of fairness favor, if anything, a narrow construction of section 401's reference to "any order." In the absence of some strong policy reason favoring a broad interpretation of "order" in section 401, the various considerations previously discussed seem sufficient to outweigh the importance of linguistic uniformity among *different sections* of the statute.

Second, New England Telephone denies that the FCC decision here at issue was embodied in a "rule;" rather, it contends we should consider it as an adjudicatory order. The decision was called a "Memorandum Opinion and *Order*" (emphasis added); and it was issued as a "declaratory order" pursuant to 47 C.F.R. § 1.2 (authorizing the Commission to issue declaratory rulings, in accordance with section 5(e) of the APA, 5 U.S.C. § 554(e)). As the Supreme Court has said, however, "[t]he particular label placed upon [a decision] by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive." *Columbia Broadcasting System, Inc. v. United States,* 316 U.S. at 416. The FCC commonly adopts rules in opinions called "orders." *See, e.g.,* 47 C.F.R. § 1.429(i); *Columbia Broadcasting System, Inc. v. United States,* 316 U.S. at 425. And, in this instance, the proceedings that led to the decision were "properly treated by the FCC as rule making proceedings under 47 C.F.R. §§ 1.399-1.429." 570 F. Supp. at 1571. The FCC has confirmed that the decision "was adopted as part of a rulemaking docket." Memorandum of Federal Communications Commission as Amicus Curiae at 16. There is no indication that anyone followed adjudicatory, rather than rulemaking, procedures.

The temptation to refer to the FCC's deliberations as an "adjudicatory proceeding" that led to a "declaratory order" arises from the FCC's consolidation of the pure *Part 31* rulemaking proceeding with GTE of Ohio's declaratory action against the Ohio Public Utilities Commission. The latter action — entitled "Petition for Declaratory Ruling" — might perhaps be regarded as adjudicatory, despite its consolidation into a rulemaking proceeding. But even if its culminating order was regarded as enforceable under 401(b), it would be enforceable against the Ohio P.U.C., not the Maine P.U.C., which was not a party to the declaratory action. (Nor for that matter was the Maine Commission a party to the Part 31 proceeding with which the Ohio proceeding was consolidated.)

Third, New England Telephone points to the importance of the policy that the FCC is trying to vindicate with its effort to enforce uniform national depreciation rules. The threat of uneconomic bypass of the existing telephone system is arguably serious and may well justify regulatory decision-making by a single national authority. Moreover, New England Telephone suggests that the FCC's authority to impose preemptive nationwide rules is obvious. *See, e.g., Computer & Communications Industry Association v. FCC,* 693 F.2d 198, 214-18 (D.C. Cir. 1982), *cert. denied,* ___ U.S. ___ (1983); *North Carolina Utilities Commission v. FCC,* 537 F.2d 787 (4th Cir.), *cert. denied,* 429 U.S. 1027 (1976). Thus, it believes the Maine commission is acting contrary to clear law. Assuming, for the sake of argument, that all this is true, however, why must section 401(b) offer the only remedy? The federal courts are currently considering the substantive arguments concerning the FCC's authority. *Virginia State Corporation Commission v. FCC, supra.* Is it not reasonable to assume that the Maine commission and the Maine courts will read the decision? And, in the meanwhile, does New England Telephone not have a remedy sufficient to ameliorate any serious threat to the national telephone network through section 401(a); can it not ask the Commission to bring an enforcement action if the threat is truly serious? Finally, why can it not obtain an adjudication from the FCC against the Maine commission, through the same declaratory ruling procedure employed by GTE of Ohio, and *then* enforce the resultant order under 401(b) if necessary? Of course, in the process, the FCC likely will have to decide how important it is to vindicate New England Telephone's position. But this agency check permits assurance that New England Telephone's claim of public importance is correct, a determination that is properly left in the first instance to the FCC.

In sum, we conclude that New England Telephone cannot bring this case in federal court under the authority of section 401(b).

The injunction is vacated and the case is remanded to the district court with instructions to dismiss the action.

APPENDIX D

Before the Federal Communications Commission

Washington, D.C. 20554

83-855
FCC 82-581
32609

CC Docket No. 79-105
RM-3017

In the Matter of

Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, of the Commission's Rules and Regulations with respect to accounting for station connections, optional payment plan revenues and customer provided equipment and sale of terminal equipment.

Petition for Declaratory Ruling on Question of Federal Preemption Involving Order Of the Public Utilities Commission of Ohio in Conflict with (i) FCC Prescriptions Under Section 220 of the Communications Act and (ii) Established FCC Policies.

MEMORANDUM OPINION AND ORDER

Adopted: December 22, 1982

Released: January 6, 1983

By the Commission: Commissioner Fogarty issuing a separate statement.

1. The Commission has before it a Petition for Reconsideration filed on June 7, 1982, by the American Telephone and Telegraph Company, on behalf of itself and the associated Bell System Operating Companies (AT&T).

AT&T seeks reconsideration of the Commission's decision in *Amendment of Part 31,* 89 FCC2d 1094 (1982) (hereinafter cited as *Preemption Order*), in which the Commission determined that Sections 220(a) and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. 220(a) and 220(b), did not preempt state commissions from applying different accounting and depreciation procedures for purposes of intrastate ratemaking proceedings.[3] The *Preemption Order* was a reconsideration of *Amendment of Part 31,* 85 FCC2d 818 (1981) (hereinafter cited as *Expensing Order*).

2. The Commission also has before it a Petition for Declaratory Ruling filed on June 7, 1982, by General Telephone Company of Ohio (GTE of Ohio). This petition requests that the Commission preempt an order of the Public Utilities Commission of Ohio (Ohio) that denied GTE of Ohio the same depreciation rates for intrastate purposes as had been prescribed by this Commission. GTE of Ohio contends that Section 220(b) established the rate prescribed by the Commission as the only depreciation rate the company could utilize.

3. The Commission established a joint reply period for the two petitions, utilizing the pleading cycle for comments in response to the Petition for Reconsideration, and allowed parties to cross-reference their pleadings where appropriate. In addition to pleadings filed by the petitioners and the GTE parties, comments or reply comments were filed by the Arkansas Public Service Commission (Arkansas), Ohio, the People of the State of California and the Public Utilities Commission of the State of California (California), the Virginia State Corporation Commission

[3] On June 8, 1982, GTE Service Corporation, on behalf of itself, United Telephone System, Inc., and Continental Telecom, Inc. (hereinafter referred to as GTE), filed a Petition for Clarification of the Commission's *Preemption Order*. This petition was dismissed as untimely. *Amendment of Part 31,* Mimeo No. 4766 (released June 24, 1982). However, the Commission stated that it would consider the substance of the petition in connection with AT&T's petition.

(Virginia), the National Association of Regulatory Utility Commissioners (NARUC), the United States Independent Telephone Association (USITA), the Office of Consumers' Counsel, State of Ohio (Consumers' Counsel), the United Telephone System Inc. and the Idaho Public Utilities Commission (Idaho). A summary of the comments is contained in Appendix A. Below we consider the issues raised on reconsideration, after which we shall consider the question presented by GTE of Ohio's Petition for Declaratory Ruling.

I. *Background*

4. In *Docket No. 19129,* 64 FCC2d 1, 54-56 (1977), we concluded that it would be desirable to have the causative rate payer bear the costs associated with station connections. We directed AT&T to file a plan for accomplishing this objective. Following AT&T's submission we initiated this proceeding, albeit with a somewhat different approach for modifying the accounting for station connections than proposed by AT&T.

5. After reviewing the comments, we concluded that the drop, block and protector portion of station connections should not be included in any accounting or regulatory revisions. We also concluded that our objective of placing the costs of station connections on the cost causative customer could not be achieved by means of an accounting change alone. This is so because associated with the provision of inside wiring must be apportioned between the federal and state jurisdictions as long as inside wiring is provided as a tariffed service subject to dual jurisdiction. Complete unbundling could be achieved by requiring inside wiring to be provided on a detariffed basis, as was done with customer premises equipment. Accordingly, we initiated a further inquiry to explore the detariffing concept further, *Amendment of Part 31,* 86 FCC2d 885 (1981).

6. Nevertheless, we concluded that changes in accounting and depreciation procedures that would begin ex-

pensing the inside wiring portion of the station connection account would be in the public interest, and would facilitate the deregulation of the provision of inside wiring if the Commission should later decide to take that approach. The principal changes required that future costs of installing inside wiring and similar costs be included as an expense in Account 605, Repair of Station Equipment. Such costs were previously capitalized in Account 232, Station Connections. The expensing of these costs would be phased in over a four year period unless a carrier obtained state commission approval to expense one hundred percent immediately. The *Expensing Order* also required that the present net investment in inside wiring and the investment capitalized during the phase-in period be amortized over a ten year period. These expensing and amortization rules replaced the depreciation procedures that had previously applied to the inside wiring portion of the station connections account.

7. On reconsideration, we concluded that the *Expensing Order* was not intended to preempt state commissions from utilizing other depreciation or accounting procedures for intrastate ratemaking proceedings, unless such preemption occurs as a matter of law. Our discussion was based in part on an assumption that most or all of the state commissions would follow our lead. We also indicated that Section 220 does not preclude state commissions from departing from accounting and depreciation rules prescribed by this Commission for purposes of regulating intrastate communications services. In reaching this conclusion, we reviewed Section 20(5), the Interstate Commerce Act predecessor of the accounting and depreciation provisions contained in Section 220. We concluded that nothing in the history of Section 20(5) provided any indication of whether that provision had been intended to preempt state commissions from prescribing divergent depreciation rates when the Interstate Commerce Commission (ICC) had prescribed a rate. We stated:

> [i]nasmuch as Section 20 had never been construed to restrict state commissions from requiring car-

> riers to keep additional records for purposes of intrastate ratemaking and court decisions in analogous contexts did not adopt an expansive interpretation of that provision, the reenactment of that language should not be interpreted to restrict state commissions from keeping such additional records in the absence of clear evidence that the 1934 Congress intended to produce that result.

Preemption Order, supra, at 1102.

8. We also reviewed the legislative history of the Communications Act and concluded that Congress had been uncertain of the preemptive effect of reenacting the Interstate Commerce Act language and that it apparently did not want to resolve the question at that time. We concluded that Congress had been attempting to obtain as much uniformity as possible without coercing any state commission to use ratemaking methods which it might find unacceptable. We found that we had proceeded in a manner consistent with this purpose for nearly four decades, noting that we had recognized divergent practices by state commissions from time-to-time. The language of Section 2(b)(1) was found to support the interpretation that state commissions are not precluded from applying different accounting and depreciation procedures from this Commission. The *Preemption Order* concluded by finding that nothing in the Act precluded us from preempting state commission actions that might interfere with or tend to frustrate policies or rules we have adopted to carry out statutory objectives with respect to interstate or foreign communications, but we also found that federal regulation would not be frustrated if carriers maintain additional records for intrastate ratemaking purposes.

II. *Discussion*

9. The question presented in the reconsideration petition is a clearly delineated controversy over whether Section 220(b) preempts state depreciation prescriptions that are inconsistent with the rates prescribed for classes of property by this Commission, or, whether Section

2(b)(1) or Section 221(b) reserve to the states the right to prescribe their own depreciation rates for intrastate regulatory purposes. Alternatively, it is argued that the Commission should preempt inconsistent state depreciation rates pursuant to its authority to preempt state actions which would frustrate or interfere with the accomplishment of federal objectives. *See North Carolina Utilities Commission v. FCC,* 537 F.2d 787 (4th Cir. 1976), *cert. denied,* 429 U.S. 1027 (1976) (hereinafter cited as *NCUC I*). The *Preemption Order* was the first time the Commission had squarely addressed the preemptive effect of a prescribed depreciation rate, despite having prescribed rates for more than thirty years. No federal court has addressed the question of the preemptive effect of a Commission prescribed depreciation rate.[4]

10. It is argued that the Commission erred in the earlier decision by concentrating on Sections 220(a) and 220(g) rather than properly analyzing Section 220(b), the provision dealing directly with depreciation. A careful review of AT&T's and GTE's pleadings and a thorough reevaluation of the entire question of the Commission's depreciation jurisdiction leads to the conclusion that the evaluation in the *Preemption Order* did not sufficiently consider the effect of Section 220(b). Accordingly, we shall undertake to evaluate anew the scope of the Commission's jurisdiction under Section 220(b).

11. Before turning to the analysis of the statutory provisions, it is necessary to understand the relationship between capitalizing and expensing a transaction or economic event. When an event is capitalized, its cost is recorded on the company's books to be recovered over some future period through depreciation charges to operating

[4] The United States Supreme Court has held that state commissions may prescribe depreciation rates where the empowered federal commission has not prescribed rates. *Northwestern Bell Telephone Co. v. Nebraska State Railway Comm.,* 297 U.S. 471 (1936). The Court specifically reserved judgment on the effect of prescribed rates by the federal commission.

expense. Depreciation as used here is an accounting convention for allocatively spreading the original cost, less net salvage, over the useful life of a capital asset. Thus, for there to be depreciation there must be costs that are to be recovered over more than one accounting period. However, when the decision to expense is made, all costs are to be recovered at one time. Thus, the decision to expense is a determination that there is no category of asset for which depreciation expense will be allowed. It is therefore clear that the decision to commence expensing the inside wiring portion of station connections involves questions of depreciation policy.

12. The law is clear that federal regulation should not be presumed to preempt state regulations without clear evidence of either congressional design to preempt the field or that state regulatory activities would obstruct the accomplishment and execution of the full purposes and objectives of Congress. *Florida Lime and Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 141 (1963), *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). Our review reveals that both criteria are satisfied in this case. In reaching this conclusion we analyzed the language of Section 220, the legislative history, relevant court cases, and our regulatory objectives.

A. *Statutory Language*

13. The Commission's express jurisdiction with respect to depreciation is set forth in Section 220(b). That section provides:

> The Commission shall, as soon as practicable, prescribe for such carriers the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. Such carriers shall not, after the

> Commission has prescribed the classes of property for which depreciation charges may be included, charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or, after the Commission has prescribed percentages of depreciation, charge with respect to any class of property a percentage of depreciation other than that prescribed therefore by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses.

14. The plain language of the statute is express and unequivocal. Section 220(b) says the Commission "shall" make depreciation prescriptions, and that carriers "shall not" charge depreciation different than that prescribed by the Commission. That this preempts inconsistent state action is further indicated in Section 220(h) which gives the Commission discretion to "except" carriers from the requirements of Section 220 "where such carriers are subject to state commission regulation."

15. The requirement of Section 220(i) that states be given an opportunity to comment before the Commission prescribes "any requirements as to accounts, records and memoranda" is consistent with an interpretation that states are preempted when the Commission has acted in the depreciation area. By providing that states be given notice, Congress ensured that state needs for accounts, records and memoranda brought to the Commission's attention would be considered. Such a procedure assures that the states' needs and legitimate interests are met.

16. In setting the duties of the Commission and the prohibitions on the carriers subject to the Act, Congress spoke of depreciation in general terms without any attempt to make distinctions between either "intrastate" or "interstate" property. This is significant because when Congress wanted to make such distinctions in the Act it

did so. See, *e.g.*, 47 U.S.C. 221(c) and (d), and 410(c). The fact that Congress did not make such a distinction here indicates that it intended no distinction.

17. Taken as a whole, the language of Section 220 appears clearly to preempt the states in connection with depreciation expense determinations and the related accounting. The language strongly implies that the states may not depart from depreciation rules prescribed by the FCC unless the Commission in its discretion allows them to do so. Otherwise, the federal statute would govern state depreciation practices in form only, allowing the states to treat substantive depreciation matters as they might choose. While that might be a plausible construction of Section 220, after full analysis we do not believe that Congress intended such a feeble gesture. There would be little purpose to require the carriers to keep all their books pursuant to an FCC prescription, and then allow the states to require the carriers to follow inconsistent depreciation practices. Instead, the language of the section and the comprehensive treatment given to this matter by the Congress demonstrate that more was intended. Accordingly, we find that the statutory language indicates that FCC depreciation prescriptions are to be followed in both the federal and state jurisdictions unless the FCC provides otherwise. As demonstrated below, this construction is also consistent with the legislative history.

B. *Legislative History*

18. In the *Preemption Order* we found that the legislative history of Section 220 was inconclusive and at most indicated that Congress was "not sure" about the preemptive effect of the new legislation. 89 FCC2d at 1106. However, the reconsideration petition and comments supporting it show that Congress believed that the language ultimately adopted would preempt the states from prescribing depreciation rates for subject carriers when the Commission had prescribed rates.

19. In our *Preemption Order,* we observed that Section 220 of the Communications Act had been adopted from

Section 20 of the Interstate Commerce Act, and our review of the few ICC cases touching upon preemption did not reveal the ICC to have possessed the kind of broad preemptive power now urged by GTE and AT&T. However, after reviewing the pre-1934 cases again, we find that, while not dispositive, they lean more toward GTE and AT&T's views than against them.

20. The closest the ICC came to delineating its position on this matter came in *Depreciation Charges of Telephone Companies,* 118 I.C.C. 295, 332 (1926), where it said:

> It seems to be well established that where a local telephone company undertakes to originate or deliver toll messages, and most of them do so undertake, practically all of its property is open for use in interstate commerce and at any time may be so used. Under such circumstances, no doubt would seem to exist as to the power of Congress to regulate the accounting practices of such companies with respect to their property, including the accounting for depreciation.

In the *Preemption Order* we focused on the fact that the ICC had not actually prescribed depreciation rates and thus there was uncertainty regarding the ICC's actual authority. However, after reviewing that case again we find that the better and more sensible interpretation is that if the ICC had prescribed depreciation rates, the state commissions would have been precluded from prescribing rates that diverged from those it prescribed. We cited *Smith v. Illinois Bell Tel. Co.,* 282 U.S. 133, 159 (1930), in the *Preemption Order* as supporting our conclusion that the ICC decision did not preempt the states. In that decision the Supreme Court held that absent ICC action prescribing depreciation rates, Section 20(5) did not preclude states from prescribing depreciation rates. Since the ICC proceeding did not actually prescribe depreciation rates, but only began a proceeding looking toward the ultimate prescription of depreciation rates, there were no depreciation rates prescribed that could have preempted state-prescribed depreciation rates. Thus *Smith* only

stands for the proposition that until the ICC actually prescribed rates, there was no basis for preempting the states. It did not reach the question of whether Section 20(5) would preempt the states if the ICC prescribed depreciation rates.[5]

21. At the hearings pertaining to the Communications Act the then chairman of the ICC indicated his belief that the ICC depreciation rulings would govern both federal and state depreciation practices:

> Paragraph (j) . . . should be most carefully considered. It unquestionably directly conflicts with, and destroys the unformity of systems of accounts and depreciation accounting required by the preceding provisions of the section. That is not true under the present law.[6]

22. Other witnesses who appeared at the hearings repeated the same view. See statements of Mr. Gifford,[7] Mr. Benton,[8] and Dr. Irvin Stewart.[9]

23. The *Preemption Order* relied heavily on the "silence contained in the Congressional Reports," 89 FCC2d 1105,

[5] Similarly, *Interstate Commerce Commission v. Goodrich Transportation Co.*, 224 U.S. 194 (1912) and *Kansas City Southern Ry. Co. v. I.R.S.*, 52 F.2d 372 (8th Cir. 1931) do not appear to have any pertinance to the issue at hand. As noted in 89 FCC2d at 1099, *Goodrich* did not raise any question with respect to the effect of ICC accounting rules upon activities not subject to ICC rate regulation. The *Kansas* holding simply reconciles two federal statutes, the Internal Revenue Code and the Interstate Commerce Act. It did not purport to establish new law on state preemption.

[6] Ltr. of F. McManamy, Hearings on S. 2910, p. 208.

[7] Hearings on H.R. 8301, pp. 191-192 (See 89 FCC2d at 1105, fn.17). The *Preemption Order* had indicated that Mr. Gifford's preemption views were tentative. However, careful review of that testimony reveals that Mr. Gifford's uncertainty may have concerned the date Section 20(5) was enacted, not preemption.

[8] Hearings on S. 2910, 73rd Cong., 2d Sess., p. 181 (1943).

[9] Hearings on H.R. 8301, 73rd Cong., 2d Sess., p. 17 (1934).

in concluding that the legislative history did not support a finding that Section 220 was intended to preempt state commissions from prescribing their own depreciation rates for intrastate purposes. However, a reexamination of the legislative history in light of the comments on reconsideration indicates that the committee reports accompanying the bills did contain language indicating that the committees believed that the predecessor provision had preempted the states. The House Report, in discussing the Section 220(j) provision (which was not adopted) that would have reserved jurisdiction over depreciation rates to the states for purposes of intrastate ratemaking, stated that the provision was "responsive to the requests of the State commissions that the present law be *changed so as to permit* those bodies to exercise, for State purposes, certain jurisdiction over . . . depreciation accounting."[10]

24. In remarks on the House floor, Representative Rayburn, Chairman, House Committee on Interstate and Foreign Commerce explained Section 220 of the proposed bill as follows:

> [p]aragraphs (a) to (g), relating to accounts records, memoranda, and depreciation, is based upon sections 20(5) to (8) of the Interstate Commerce Act with *changes necessary to permit State commissions to prescribe* the systems of accounts for the intrastate operation of carriers. Paragraphs (h) to (j) are new . . . *paragraph (j) removes any limi-*

[10] H.R. Rep. No. 1850, 73rd Cong., 2d Sess. 7 (1934) (emphasis added). The section (j) proposed by the House would have provided: "Nothing in this section shall (1) limit the power of a State commission to prescribe, for the purposes of the exercise of its jurisdiction with respect to any carrier the percentage rate of depreciation to be charged to any class of property of such carrier, or the composite depreciation rate, for the purpose of determining charges, accounts, records, or practices; (2) relieve any carrier from keeping any accounts, records, or memoranda which may be required to be kept by any State commission in pursuance of authority granted under State Law." H.R. 8301, 73rd Cong., 2d Sess. Section 220(i) (February 27, 1934).

tation upon the power of a State commission to prescribe, for the purposes of the exercise of its jurisdiction, rates of depreciation. The last three paragraphs named were placed in the bill at the request of the State commissions which feel that their task of regulating intrastate communications will be greatly facilitiated by the adoption of these paragraphs.[11]

25. The Senate version of Subsection (j) took a totally different approach than the House version. It called "for investigation and report to Congress instead of immediately turning over these matters to the State." S. Rep. No. 781, 73rd Cong., 2d Sess. 5 (1934).[12] The version of Section 220(j) finally enacted was the result of agreement in the conference committee. The conferences agreed to adopt the House provisions as to Sections 220(h) and (i), but decided against the House Section 220(j) proposal to remove any limitation upon the power of states to prescribe rates of depreciation. Instead, Section 220(j) was modified along the lines of the Senate proposal to require the Commission to "investigate and report to Congress as to the need for legislation to define or further harmonize the powers of the Commission and of State commissions with respect to other matters to which this section relates." Conf. Comm. Rep. No. 1918, 73rd Cong., 2d Sess. 17 (1934). The obvious inference to be drawn is that the conferees were not prepared at that time to allow the states to prescribe

[11] 78 Cong. Rec. 10314 (1934) (emphasis added).

[12] The Senate version of Section 220(j) provided: "The Commission shall investigate and report to the Congress whether in its opinion legislation is desirable (1) authorizing the Commission to except the carriers of any particular class or classes in any State from any of the requirements under this section in cases where such carriers are subject to State commission regulation with respect to matters to which this section relates; and (2) permitting the State commissions, in pursuance of authority granted under State Law, to prescribe their own percentage rates of depreciation or systems of accounts records, or memoranda to be kept by carriers." S. 3285, 73rd Cong., 2d Sess. Section 220(j) (March 28, 1934).

depreciation rates different than those established at the federal level, but that matter might be considered later if the report required by Section 220(j) indicated it to be appropriate.

26. The hearing testimony and Committee reports therefore indicate that the language being recodified from Section 20(5) of the Interstate Commerce Act preempted the state commissions' jurisdiction over depreciation. The rules of statutory construction provide that where Congress reenacts a provision from an existing statute, it intends that the construction applicable to the existing provision apply as well to the new provision.[13] The legislative history thus supports the actual language of Section 220(b) and indicates that Congress intended to preempt state commission jurisdiction over depreciation rates for subject carriers when it recodified the language from the Interstate Commerce Act. Accordingly, we conclude that the analysis of the legislative history contained in the comments of AT&T and GTE accurately represents the intent of Congress and that the more persuasive reading of the legislative history supports the construction that Section 220(b) preempts inconsistent state action where the Commission has prescribed depreciation rates for a carrier.

C. *Administrative and Court Decisions*

27. The *Preemption Order* cited *Accounting Rules for Telephone Companies,* 203 ICC 13 (1934), as evidence that the FCC could not preempt state depreciation practices. There the ICC recognized that states might have additional accounting needs and indicated that it had permitted state-prescribed s[illegible] accounts within the federally-required books of accou[illegible]. However, the adoption of a blanket subdivision rule does not lead to the conclusion that federally adopted accounting and de-

[13] Courts have given weight to interpretations of the Interstate Commerce Act in interpreting the Communications Act. See, *e.g., American Telephone and Telegraph Company v. FCC,* 487 F.2d 865 (2d Cir. 1973).

preciation rules are not preemptive. Rather, it reflects an awareness that state commissions may have special data requirements to properly administer their regulatory policies which may require additional detail beyond that prescribed by the federal agency. A subdivision rule, however, does not permit what is accounted for as an expense to be capitalized in the guise of subdividing an expense account. While we may allow subdivisions of accounts, we will not allow inconsistent accounting or depreciation methods unless such practices are otherwise consistent with the public interest. Any other policy would obliterate the prescriptive effect of our adoption of a uniform system of accounts.

28. In fact we have approved variations from the prescribed uniform system of accounts. For example, our rules give carriers blanket authority to subdivide certain prescribed accounts "provided such subdivisions do not impair the integrity of the accounts prescribed." 47 C.F.R. 31.01-2(d)(1). C.F. 31.01-2(f), authorizing carriers to subdivide accounts "in the manner ordered by any state commission having jurisdiction. . . ." We also have approved state commission rate making treatment of plant under construction different from that adopted by us. See 89 FCC2d at 1107.

29. There may well have been some instances of inconsistent state treatment of depreciation in the past. However, we do not seek controversy unless it is necessary to protect vital federal interests. Either such instances did not come to our attention or they may not have appeared threatening to federal interests.[14] In the past the communications marketplace was typified by monopoly conditions and life and salvage factors underlying the state rates were generally very similar, if not identical, to those

[14] *Pacific Telephone and Telegraph Company v. California*, 401 P.2d 353 (1965), was cited in the *Preemption Order* to support nonpreemption. However, the California Supreme Court did not analyze Section 220(b) or its legislative history and its determination is therefore unpersuasive.

used by the Commission. In that environment it was not essential that the Commission assert all the authority granted it. See *Computer and Communications Industry Association v. FCC*, No. 80-1471 (D.C. Cir. November 12, 1982). As discussed, *infra.*, in the more competitive conditions prevailing today, the utilization of proper methods and rates is more critical if the proper incentives are to be created to insure that the marketplace will function efficiently to bring the benefits of that competition to the ratepayers of this country. Therefore, where it is necessary to protect important federal policies against frustration by inconsistent state actions, we will exercise the full breadth of our depreciation powers. *See* para. 14 above.

30. Nor is there any merit to the argument that federal preemption of depreciation practices constitutes intrastate ratemaking which might run afoul of 47 U.S.C. 152(b). Section 220(b) only prohibits the states from setting depreciation rates for telephone property inconsistent from those prescribed by the FCC. It does not require that any particular tariff for intrastate service be accepted by the state commissions. The setting of depreciation rates and classes of depreciable property only resolves a single issue impacting the ratemaking process. It does not restrict the state commission's broad discretion in setting charges for individual services. In any event, Section 2(b) of the Act, 47 U.S.C. 152(b), has a well defined purpose which would not be implicated here: "to restrain the Commission from interfering with those essentially local incidents and practices of common carriage by wire that do not substantially encroach upon the administration and development of the interstate telephone network." *NCUC I, supra* at 794 n.6. Here the setting of depreciation rates is not an essentially local incident or practice and it has substantial effects upon the administration and development of the interstate telephone network.[15]

[15] Nor is federal preemption of depreciation practices inconsistent with 47 U.S.C. 221(b). Section 221(b) was intended to reserve state jurisdiction over exchange rates where exchange

D. *Preemption Under Federal Supremacy*

31. Even if one were to assume that Section 220(b) did not automatically preempt the states whenever this Commission has acted, federal preemption of inconsistent state depreciation would be justified in this case to avoid frustration of validly adopted federal policies. The Fourth Circuit has stated:

> We have no doubt that the provisions of section 2(b) deprive the Commission of regulatory power over local services, facilities and disputes that in their nature and effect are separable from and do not substantially affect the conduct or development of interstate communications. But beyond that, we are not persuaded that section 2(b) sanctions any state regulation, formally restrictive only of intrastate communication, that in effect encroaches substantially upon the Commission's authority under sections 201 through 205.

NCUC I, supra at 793. To the same effect, see *Computer and Communications Industry Association v. FCC, supra* at 35.

32. The D.C. Circuit recently addressed the preemption question, observing:

> We fail to see any distinction in this case between preemption principles applicable to state ratemaking authority and those applicable to other state powers. The operative principle [is that] . . . preemption of state tariffs on CPE is justified because state tariffs would interfere with the consumer's right to purchase CPE separately from

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boundaries extend over two states. That provision was not intended to create new reservations to the state beyond that contained in Section 2(b) and the narrow circumstance encompassed by interstate exchanges. See *Computer and Communications Industry Association v. FCC, supra,* and *North Carolina Utilities Commission v. FCC,* 552 F.2d 1036, 1046 (4th Cir. 1976), *cert. denied,* 434 U.S. 874 (1977) (hereinafter cited as *NCUC II*).

> transmission service and would thus frustrate the validly adopted federal policy.

Id. at 38. The court went on to find that conflicting state regulation may be preempted even though there is some indirect effect on state ratemaking discretion, noting:

> the Act itself does not distinguish between authority over rates and authority over other aspects of communications. Sections 2(a) and (b) of the Act allocate federal and state authority with regard to both "charges [and] . . . facilities." Therefore, conflicting federal and state regulations regarding dual use CPE are no more acceptable under the Act when equipment rates are involved, as here, than when interconnection policies are involved, as in the *NCUC* cases.

Id. at 38-39.

33. The provision for adequate capital recovery is important to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, world-wide wire and radio communication service with adequate facilities at reasonable charges. . . ." 47 U.S.C. 151. State depreciation rate prescriptions that do not adequately provide for capital recovery in the competitive environment, which constitutes this Commission's policy in those markets found capable of supporting competition, would frustrate the accomplishment of that policy and are preemptable by this Commission.

34. Over the past decade the Commission has embarked in several areas of telecommunications to pursue a policy of encouraging competition wherever the market conditions will support such a policy and produce benefits to the public interest. In *MTS-WATS Market Structure Inquiry,* 81 FCC2d 177 (1980), the Commission opened the domestic MTS-WATS market to competitive entry, reserving the question of

impair their ability to raise the investment capital they will need to fully compete in the continually evolving competitive telecommunications marketplace.[16] Such a result could undermine the achievement of the Commission's objective to develop policies that will engender a dynamic, efficient telecommunications marketplace with services being provided at reasonable prices.

38. NARUC contends that preemption with respect to station connections is unnecessary and will not produce competitive benefits because expensing is not the same as unbundling. While NARUC is correct is a strict sense, it avoids the critical issue, which is the proper timing of cost

[16] AT&T and GTE indicate several state commissions have refused to follow, have indicated an intent not to follow, or are being urged not to follow Commission determinations with respect to the expensing of inside wiring and/or the adoption of straight-line equal life group or remaining life depreciation methods. A staff review of state action in conjunction with AT&T intrastate tariff proceedings reveals that all but two states have approved expensing of station connections, that 13 states have rejected and 12 have approved equal life group depreciation, and 9 states have rejected and 22 have approved remaining life group depreciation. Prior to issuing our *Order* in this docket we did not expect that such significant variance would be required by states.

recovery. If the Commission preempts with respect to station connections and all states must expense these costs, current ratepayers will be paying these costs instead of future ratepayers as would be the case with capitalization. Thus, future prices will reflect the appropriate costs for providing those services. Moreover, if these costs are expensed and state commissions must allow rates to cover these costs, it is likely that the cost causative ratepayer will in many cases be charged for the costs being expensed in connection with the provision of inside wiring. Thus, the Commission's objective may be substantially achieved by preempting state commissions from departing from our expensing rules.

39. In 1971 Congress amended the Communications Act to change the procedures for allocating costs between federal and state jurisdictions by adding Section 410(c). The Commission was given the ultimate authority with respect to such allocations, further solidifying its superintendency over common carrier communications. See *NCUC I, supra* at 795. Section 410(c) procedures provide for uniformity in the separations process, thereby insuring that plant, expenses and revenues will be rationally accounted for in the dual jurisdictional environment. The utilization of one depreciation rate is the most effective method for insuring that this uniformity will be maintained and to insure that no jurisdiction bears a greater burden than another in the transition to a fully competitive marketplace. Several parties suggest that under or over recovery will result from one jurisdiction or another because of the shifting usage patterns for telephone plant over time and argue that if such a result were to occur, significant inequities would result to both ratepayers and carriers. A uniform depreciation rate for each class of property applicable to all property whether allocated to the federal or state jurisdiction clearly eliminates these potential problems.

40. For all of these reasons, it is apparent to us that a substantial impact on federal policies could result if state

commissions were allowed to diverge from Commission prescribed depreciation rates and practices. Accordingly, it is essential to preempt inconsistent state depreciation practices to avoid frustration of these vital national policies.

III. *Declaratory Ruling Petition.*

41. GTE of Ohio seeks to have the Commission preempt an order of the Ohio Public Utilities Commission that did not approve remaining life and equal life group rates for intrastate ratemaking purposes. As alleged by GTE of Ohio, the differential in rates amounts to seven million dollars per year. GTE of Ohio states that failure of this Commission to preempt the state will frustrate the achievement of federal policies adopted by this Commission. Its argument is similar to those cited in connection with the reconsideration petition.

42. Essentially the same arguments are made against the GTE of Ohio petition as were urged on reconsideration with regard to the substance of the issue. However, Ohio cites an Ohio statute that precludes the state commission from adopting remaining life depreciation for intrastate purposes.

43. One procedural argument is raised by Ohio with respect to the petition. It contends that the question presented is premature since the order is subject to further reconsideration before the Ohio Commission pursuant to a request filed by GTE of Ohio. We do not agree since the purpose of declaratory rulings is to give guidance to affected persons in areas where uncertainty or confusion exists. A case or controversy in the judicial sense is not required, *NCUC I, supra* at 790-1. In this case, it appears necessary to issue such a ruling to clarify for the state commissions and the carriers the effect of our depreciation prescriptions. The fact that reconsiderations proceedings are under way in Ohio does not mitigate against such a course in light of the divergencies from this Commission's depreciation methods and rates that are occurring to the

detriment of federal policies. Thus, we find it imperative to declare today that inconsistent state prescribed depreciation rates are preempted by the Communications Act and are accordingly void. The existence of a state statute preventing a state commission from adopting a particular method does not affect this determination. When federal preemption is involved, there is no difference between a statute or a regulation of a state commission. Both must fall in the face of overriding federal concerns and policies.

IV. *Conclusion*

44. We have carefully reviewed the record upon reconsideration. The issues raised concerning the *Preemption Order* caused us to reevaluate the statutory language of Section 220(b), the legislative history of the provision, and the relevant judicial and administrative proceedings relating to the subject. Our considered judgment after this review is that the *Preemption Order* must be reconsidered. We find that the most logical and reasonable interpretation of Section 220(b) of the Act is that where the Commission prescribes depreciation rates for classes of property, state commissions are precluded from departing from those rates. Since the depreciation method utilized is a material part in determining the rate to be applied, state commissions are also precluded from departing from the depreciation methods prescribed by the Commission. Thus, the *Expensing Order* is binding upon state commissions and they must expense additions to inside wiring in accordance with the plan established therein. Moreover, they must follow the amortization procedures adopted in that decision for the embedded inside wiring and any additions to the capitalized amount as a result of the phase-in of the expensing of inside wiring.

45. Even if Section 220(b) does not preempt state commissions, we would act under our authority to preempt state actions that interfere with the accomplishment of federal policies and objectives. *Computer and Communications Industry Association v. FCC, supra,* and

NCUC II. We note that petitioner and the parties supporting the petition cite several states that have indicated they do not intend to follow the commission's depreciation prescriptions or expensing of inside wiring, or have refused to follow either. In light of the concerns expressed about an efficiently functioning market, we must find that inconsistent depreciation rates prescribed by state commissions will interfere with the efficient operation of the communications marketplace and thereby frustrate the achievement of the Commission's policies. Accordingly, we find that this Commission's depreciation policies and rates, including the expensing of inside wiring, preempt inconsistent state depreciation policies and rates.

46. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), and 220(b), That the Petition for Reconsideration filed by the American Telephone and Telegraph Company IS GRANTED.

47. IT IS FURTHER ORDERED, That the Petition for Declaratory Ruling filed by General Telephone Company of Ohio IS GRANTED to be extent reflected herein.

48. IT IS FURTHER ORDERED, That the Secretary shall cause this order to the published in the Federal Register.

49. IT IS FURTHER ORDERED, That the Secretary shall cause a copy of this order to be served on each state commission.

FEDERAL COMMUNICATIONS COMMISSION[17]

William J. Tricarico,
Secretary

[17] *See attached separate statement of Commissioner Joseph R. Fogarty.*

Appendix A. Summary of Comments

1. AT&T argues that the Commission on reconsideration should find that state commissions are precluded from departing from the depreciation methods and rates established by this Commission in order to allow the carriers to achieve timely capital recovery. It views the *Preemption Order* as a retreat from the Commission's competitive policies.

2. AT&T asserts that realistic depreciation rates are essential to attain accurate cost-based pricing decisions to prevent artificial barriers to competition, to foster technological innovation which will enhance network efficiency and the availability of competitive alternatives, to facilitate the timely implementation of the detariffing of customer premises equipment[18] and to insure the financial viability of the carriers. It contends that competitive conditions result in faster obsolescence and shorter asset lives, requiring that depreciation methods and rates be inseparable from ratemaking to insure capital recovery.

3. AT&T proposes two legal theories for preempting state commission action. First, it asserts that the Commission may preempt under Sections 1 and 2 of the Act, citing *California v. FCC*, 567 F.2d 84, 86 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978), *NCUC II*, *NCUC I*, and *NARUC v. FCC*, 533 F.2d 601 (D.C. Cir. 1976). It states that because of the central role depreciation, including the depreciation aspects of station connections, plays in the achievement of the Commission's policies, preemption is necessary to avoid interference with or frustration of these policies.

4. AT&T's second theory is that Section 220(b) preempts states on its face, asserting that in its earlier

[18] It contends that different depreciation rates between jurisdictions will result in disagreements about net book value in deregulating CPE and that the application of the Separations Manual will create uncertainty as to which plant a particular book value relates.

pleadings it did not rely on Section 220(g) as suggested by the commission's decision. It argues that Section 220 gives the Commission discretion with respect to accounting rules, but does not give it such discretion with regard to depreciation prescriptions. AT&T states that the Commission's rule allowing carriers to subdivide an account to comply with a state commission order does not mean that a state can require capitalization when this Commission requires expensing. Finally, it submits that the Commission misread the legislative history of the Communications Act by failing to consider statements in the committee reports and remarks of members at committee hearings that indicate Congress believed the Interstate Commerce Act provisions from which Section 220(b) was taken did in fact preempt the states. See also *Depreciation Charges of Telephone Companies*, 118 I.C.C. 295 (1926).

5. GTE asserts that the Commission's policies in the areas of competition and faster capital recovery will be frustrated if the state commissions are allowed to depart from the depreciation rates and methods prescribed by the Commission. It contends that Section 220(b) preempts the states and distinguishes Section 220(a) as being discretionary on the Commission and argues that the Commission focused only on the provisions of Section 220(a) in its earlier decision. It submits that there is no doubt that a state can require a carrier to keep additional records and memoranda. However, GTE argues that the Commission's decision is overly broad. It is clear, GTE contends, that the Commission can preempt inconsistent state action when it conflicts with national telecommunications policies, and it should do so in this case. GTE also argues that the legislative history and the rules of statutory construction indicate that Congress intended to preempt the states in the area of depreciation, submitting that property cannot be successfully depreciated at two different rates prescribed by different regulatory bodies because under or over recovery from one or the other jurisdiction will occur from the use of shifting usage factors.

6. The oppositions generally argue that the states have the jurisdiction to determine the extent to which intrastate rates reflect depreciation and expensing adjustments promulgated by the Commission. Sections 2(b) and 221(b) are cited as reserving jurisdiction over local and intrastate telephone rates to the states as intended by Congress when it distinguished between "interstate" and "intrastate" in Sections 1 and 2. Ohio argues that the preemption argument was rejected in the only case of which it is aware, *Pacific Telephone and Telegraph Company v. California*, 401 P.2d 353 (1965).

7. Ohio asserts that the courts have distinguished between ratemaking and interconnection policies, *NCUC II* and *NCUC I*, and submits that it is the ratemaking jurisdiction reserved to the states that is in question in this proceeding. To permit the Commission to prescribe depreciation rates applicable to all property whether used for interstate or intrastate services would, in Ohio's view, be equivalent to giving the FCC a hand in setting state rates.

8. Ohio is concerned that under some methods, such as remaining life, costs will not be charged to consumers who receive the benefits of the property being depreciated. Finally, it contends that Sections 220(i) and (j) are consistent with concurrent jurisdiction.

9. Ohio argues that GTE is attempting to have the Commission read Section 2(b) out of the Act, and asserts that it is inappropriate to ignore language in a statute, to extend a statute beyond its clear import, or to embrace subjects not specifically enumerated. Section 2(b)(1) is stated by Ohio to have been intended to reverse the Supreme Court decision in *Houston East and West Texas Ry. v. U.S.*, 234 U.S. 342 (1914), wherein the ICC was given the power to suspend intrastate rates enabling carriers to raise intrastate rates to federal levels for similar distances. NARUC and Ohio argue that Section 2(b) was intended to ensure that state jurisdiction was not limited by the 1934 legislation.

10. Several parties assert that there is considerable Commission precedent recognizing the states' independent ratemaking authority, including departures from Commission prescribed accounting, for intrastate rates. They note that the Commission has encouraged state commissions to devote more resources to depreciation matters, *Amendment of Part 31,* 83 FCC2d 267 (1980) *recon.*, 87 FCC2d 916 (1981), has recognized in this proceeding the state jurisdiction over expensing of station connections for state ratemaking purposes, has recognized divergent treatment of interest during construction and has not contested California's use of remaining life for approximately thirty years. Ohio argues that there is nothing to suggest that there needs to be national uniformity in depreciation procedures and that local diversity is desirable, noting that even a GTE of Ohio witness in an Ohio rate case has indicated that local diversity in setting depreciation rates is preferable.

11. Ohio contends that *McDonnell Douglas Corp. v. General Telephone Company of California,* 594 F.2d 720 (9th Cir. 1979), recognized the validity of intrastate regulatory jurisdiction under the Act by finding that Congress in enacting Section 2(b) had intended to give states considerable power with respect to wire communications that are wholly intrastate in nature.

12. California argues that the Commission's refusal to preempt state power to prescribe depreciation rates for intrastate ratemaking purposes will not undermine the Commission's procompetitive policies or signal a retreat since many states have adopted policies that foster competition. AT&T's assertion that preemption must be exercised to promote procompetitive policies is rejected by NARUC as unsupported. It states that expensing of station connection costs can have no competitive effect because expensing is not the same as unbundling. Moreover, it contends that the Commission did not adopt remaining life and equal life group depreciation procedures to promote competition but, rather, to more

properly time capital recovery and insure that any deficiency in past depreciation was adjusted. Finally, NARUC states that the speculative statements about the nfumbers of states that are not following the Commission's policies are inadequate to justify preempting state commission jurisdiction on the theory that federal policies are being frustrated.

13. NARUC argues that the attempted distinction of Section 220(a) from Section 220(b) on the basis that Section 220(b) is mandatory while Section 220(a) is discretionary does not address the question of the preemptive effect of either section. It contends that neither reason nor case law provides support for asserting that preemption of state regulation of intrastate communications is automatic with respect to subject areas which the FCC must regulate on the interstate level. It further notes that the language of Section 220(b) does not differ significantly from that in Section 220(g) with respect to the effect of prescribed depreciation rates, accounts or records other than as prescribed by the Commission. NARUC states that the relationship between accounting and ratemaking is self evident and argues that state control over intrastate rates would have little vitality if state commissions were deprived of the power to disallow expenses and depreciation claimed by carriers. NARUC asserts that the fact that a proposed Section 220(j) that would have expressly reserved depreciation prescription powers to the states was not adopted does not mean that states must be bound by Commission depreciation prescriptions, stating that the final provision adopted was a compromise.

14. Consumers' Counsel supports the Commission's *Preemption Order* and generally cites from that *Order* in support of its position. Idaho also agrees with the conclusion of the Order and states that it believes that administrative costs of separate record keeping to meet state requirements will be small Arkansas filed to indicate that its opinions had not rejected the new depreciation

methods outright but had left the decision to individual cases for resolution.

15. AT&T's reply submits that the setting of depreciation rates does not constitute the exercise of jurisdiction with respect to charges for intrastate services. It argues that Section 2(b) does not deprive this Commission of jurisdiction over jointly used property where its regulation affects the conduct or development of interstate communications. AT&T states that if a state utilized the depreciation rate prescribed by the Commission, it may make adjustments to the test period data to reflect concepts of used and useful property or other pro forma adjustments to reflect conditions during the period during which the tariff will be in effect.

16. AT&T distinguishes *Houston East and West Texas Ry. Co. v. U.S., supra,* by asserting that that case involved actual preemption of service rates. It notes that while Congress may have sought to reverse that decision in the communications field, the issue here is only the jurisdiction to prescribe depreciation rates. Thus, it contends that the case actually suggests that Section 2(b) should be narrowly interpreted. Moreover, while use of federally prescribed depreciation rates may significantly affect intrastate rates, the states remain free to price individual service rates. See *e.g., NCUC I.*

17. USITA submits that federal preemption of jurisdiction over depreciation rate prescriptions for carriers for which the Commission has prescribed depreciation rates would not interfere with state commission ability to set intrastate service rates in accordance with any ratemaking method desired. It contends that the setting of depreciation rates is not a ratemaking function pursuant to Sections 201-205, but is the exercise of a specific power granted to the Commission by Congress. USITA argues that divergent depreciation rates create confusion and raise problems of capital recovery.

18. GTE contends that state action whether in the nature of ratemaking or otherwise which "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" will be preempted. *Fidelity Federal Savings and Loan Association v. de la Cuesta,* 50 LW 4916, 4919 (1982). GTE concludes that the states do not have the power through the guise of ratemaking to negate FCC action designed to give effect to federal statutory objectives. GTE does not challenge state rights pursuant to state statutes to regulate rates for intrastate services. It asserts that no preclusion of state ratemaking jurisdiction would result from FCC preemption under Section 220(b), although failure to preempt will endanger important national policies.

19. GTE submits that Section 220(b) charges the Commission with the responsibility of prescribing depreciation rates for carriers subject to the Act and recognizes only two exceptions. First, the Commission should act as soon as possible. Second, Section 220(h) recognizes that certain classes of carriers may be exempted. The Commission, according to GTE, has not exercised its authority pursuant to this provision in this proceeding. Finally, GTE argues that reliance on *NCUC I* and *NCUC II* as supporting a finding that the Commission cannot preempt state commission depreciation prescriptions for carriers subject to the Act is inconsistent with the holdings and analysis of those cases. AT&T and GTE submit that Section 221(b) is inapplicable because that provision was intended only to give states the jurisdiction to regulate local exchange service extending over a state boundary.

SEPARATE STATEMENT OF COMMISSIONER JOSEPH R. FOGARTY

In Re: Reconsideration of Docket No. CC 79-105.

Having dissented from the Commission's original decision declining to preempt State accounting and de-

preciation rules inconsistent with those prescribed by the FCC,[19] I am pleased that the Commission has reconsidered this issue and acted to preempt such inconsistent State regulation.

As this *Order* establishes in detail, a true reading of the statutory language and legislative history of Section 220(b) of the Communications Act clearly demonstrates that Congress intended FCC depreciation rules and policies to control the field.

Even if preemption were not explicitly mandated by Section 220(b), the effective implementation of our pro-competitive federal telecommunications policies dictate that inconsistent State depreciation regulation be preempted by this Commission. We cannot "defer to the States" on capital recovery issues. Telephone companies must be able to recover their cost of capital in a timely and effective manner if they are to price their services efficiently and to improve and expand their facilities to meet the challenges of competition and technologic innovation.

This preemption imperative is not merely theoretical. Too many States (e.g., Alabama, Louisiana, Nebraska, Ohio, New Jersey, Michigan, Arkansas) have already refused to recognize the critical necessity of the FCC's cost recovery principles. The resulting depreciation rate differentials are alarming: GTE of Ohio has indicated that it will be denied $7 million in capital recovery this year if the State of Ohio's disparate depreciation treatment is allowed to prevail.

The FCC cannot ignore the detrimental impacts of inconsistent State treatment of depreciation if our pro-competitive policies are to have any integrity and viability. This Commission now recognizes that pre-

[19] Amendment of Part 31, Joint Dissenting Statement of Commissioners Joseph R. Fogarty and Anne P. Jones, 89 FCC2d 1109-1111 (1981).

emption is both mandated as a matter of law and essential as a matter of policy, and our action today has my full endorsement and support.